Supreme Court, U.S.
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No. 00-

IN THE

Supreme Court of the United States

STEPHEN HALLADAY CROLL,

Petitioner,

v.

MEI YEE CROLL,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Respondent filed her notice of appeal from the decision of the United States District Court in the Southern District of New York ordering the return of the parties child to Hong Kong pursuant to the Hague Convention on the Civil Aspects of International Child Abduction (hereinafter "the Hague Convention".)

The Court of Appeals for the Second Circuit reversed the decision of the District Court on the grounds that a *ne exeat* order does not confer a right of custody under the Hague Convention.

Does a *ne exeat* order restricting removal of a child from a country create "custody rights" within the definition of this term in Article 5 of the Hague Child Abduction Convention, as has been accepted by the courts of other countries interpreting the Convention; or should courts in the United States depart from this accepted international understanding, thereby creating disuniformity with respect to interpretation of an international treaty?

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Stephen Halliday Croll respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit that gives rise to this petition is published at 229 F.3d 133 (second circuit September 20, 2000). It is reprinted in Appendix A hereto (App. A) at 1a. By order filed January 25, 2001, the Second Circuit denied the petition for rehearing and suggestion for rehearing en banc. App. C at 66a.

STATEMENT OF JURISDICTION

On October 19, 1999 the United States District Court for the Southern District issued a memorandum decision granting Mr. Croll's Hague petition. Mei Lee Croll filed a notice of Appeal to the United States Court of Appeals for the Second Circuit. On September 20, 2000 the Court of Appeals formally entered its order reversing the decision of the District Court. On January 25, 2001 Mr. Croll's motion for rehearing and suggestion for rehearing en banc was denied. Pursuant to Supreme Court Rule 13.1, this petition has been filed within 90 days of the denial of rehearing.

The jurisdiction of the Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED IN THIS CASE

The Hague Convention of October 25, 1980 on the Civil Aspects of International Child Abduction, the implementing legislation for the Hague Convention is the International Child Abduction Remedies Act ("the ICARA"), adopted in 1988 and codified in Title 42, United State Code, Sections 11601-11610.

Article 3 of the Hague Convention provides:

> The removal or the retention of a child is to be considered wrongful where:
>
> > (a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and
> >
> > (b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.

The rights of custody mentioned in sub-paragraph (a) above, may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of the State.

Article 5 provides:

For the purposes of this Convention:

> (a) "rights of custody" shall include rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence;
>
> (b) "rights of access" shall include the right to take a child for a limited period of time to a place other than the child's habitual residence.

STATEMENT OF THE CASE

The question on which certiorari is sought is one of exceptional importance and involves the interpretation of a key concept in an international treaty on international child abduction, the Hague Convention of October 25, 1980 on the Civil Aspects of International Child Abduction (hereafter "the Hague Convention"). The 2-1 majority panel opinion of the Second Circuit Court of Appeals is not only inconsistent with other decisions of courts in the United States interpreting the issue, but it is also against the overwhelming weight of case authority in other countries that are parties to the Hague Convention. The ruling by an important federal Court of Appeals has the potential to

disrupt the operation of the Convention and should not be allowed to carry such weight in the absence of Supreme Court review.

The issue of treaty interpretation that divided the panel in the Second Circuit was whether a *ne exeat* order creates "rights of custody" within the meaning of Article 5 of the Hague Convention. Only when there has been a breach of "custody rights" is an order of return of the child required under the Convention. In a 2-1 decision, two members of the Second Circuit panel (one sitting by designation) held that a custody order explicitly restricting removal of the child from a country did not create "custody rights" in the non-custodial parent. Such a determination is inconsistent with express Convention language in Article 5 of the Convention that provides: "For the purposes of this Convention — (a) " 'rights of custody' shall include rights relating to the care of the person of the child, and in particular, the right to determine the child's place of residence". Significantly, the district judge, Judge Stein, did find that the *ne exeat* order constituted "custody rights" within the meaning of the Convention; and Second Circuit Court of Appeals Judge Sonia Sotomayor wrote a careful and well-researched dissent to the majority opinion, setting forth extensive reasons why she too agreed that "custody rights" had been breached in these circumstances. The disagreement among the judges who ruled in *Croll* takes on added significance because other courts, both in the United States and in other Convention countries, have found "custody rights" in this context.

There is concurrent federal and state court jurisdiction to hear applications for return under the Hague Abduction Convention, and the specific issue of whether a *ne exeat* order creates "custody rights" has heretofore arisen primarily in

the state courts. Those courts have found that the power to control relocation of a child via a restriction on removal of the child is a "custody right" protected by the Convention. *See David S. v. Zamira S.*, 574 N.Y.S.2d 429, 432 (N.Y. Fam. Ct. 1991) (custody order containing a *ne exeat* clause creates custody rights in father); *D'Assignies v. Escalante*, (No BD 051876) (Cal. Super. Ct., Dec. 9, 1991); (www.incadat. comref: HC/E/US s 198); *Janakakis-Kostun v. Janakakis*, 6 S.W.3d 843, 849 (Ky. Ct. App. 1999), *cert. denied*, 148 L. Ed. 2d 13, 121 S. Ct. 32 (2000) (order of non-removal combined with temporary visitations rights gave father "custodial rights" enforceable under the Convention).

Moreover, leading decisions in South Africa, Australia, Canada, the United Kingdom, France, and Israel have interpreted *ne exeat* clauses as conferring "custody rights" within the meaning of the Abduction Convention. *See, e.g., Sonderup v. Tondelli* (SA 2000) No CCR 53/00 (non-removal provision creates "rights of custody", expressly disapproving the *Croll* decision in the U.S.); *In the Marriage of: Jose Garcia Resina and Muriel Gislaine Henriette Resina*, Appeal No. 52, 1991 (Fam) (Austl) (reciprocal *ne exeat* rights of each parent created "rights of custody" in the otherwise non-custodial father); *Thorne v. Dryden-Hall*, (1997) 28 FRL (4th) 297 (Brit. Col.) (residence order to mother with restriction on removal constituted custody rights); *C. v. C.*, [1989], 1 W.L.R. 654, 658 (Eng. C.A. 1989) (where mother had custody but neither parent could remove child without consent of the other, father had "custody rights"); *Ministere Public v. Mme B, Cour d'appel d'Aix en Provence* (Mar. 23, 1989) (order granting custody which prohibited custodian from removing the child from the court's jurisdiction creates "custody rights under the Abduction Convention; *Foxman v. Foxman*, 92(3) P.D. 2272 (Isr.) ("custody rights" include situation where parental consent is required before child is taken out of the country).

Because *Croll* emanates from an important federal circuit and is likely to influence other courts in the United States interpreting the Abduction Convention, it is imperative that this ruling be reviewed by the Supreme Court. The implementing legislation for the Hague Convention is the International Child Abduction Remedies Act ("ICARA"), adopted in 1988 and codified in Title 42, United States Code, Section 11601-11610. In 42 U.S.C. § 11601(b)(3), Congress, among its "Finding and declaration", stated:

> (3) In enacting this chapter the Congress recognizes;;
>
> > (A) the international character of the Convention; and
> >
> > (B) the need for uniform interpretation of the Convention.

Thus there is express Congressional recognition of the need for the courts in the United States to strive for uniform interpretation of the Convention's provisions.

The Abduction Convention now has 62 State parties. The Convention contemplates an "autonomous" definition of "custody rights" to further the objectives of the Convention, *see Whallon v. Lynn*, 230 F.3d 450 (1st Cir. 2000), and the *Croll* decision interferes with that uniformity of interpretation. As a result, the ruling undermines the protection of families protected by the Convention and presents potential diplomatic embarrassment for the United States.

The ruling in *Croll* is also inconsistent with the clear understanding of the delegates that adopted the final text of

the Abduction Convention at the diplomatic conference in October 1980. *See* 3 Hague Conference on Private International Law: Actes et Documents De La Quartorzieme Session 266-67 (1980). Moreover, the Special Commissions that have reviewed the operation of the Child Abduction Convention have indicated the necessity of understanding the broad nature of "custody rights" under the Convention, separate from any particular domestic law system. *See* Hague Conference on Private International Law, Overall Conclusions of the Special Commission of October 1989 on the Operation of the Hague Convention of 25 October 1980 on the Civil Aspects of Child Abduction, 29 I.L.M. 220, 222 (1990); Report of the Second Special Commission Meeting to Review the Operation of the Hague Convention on the Civil Aspects of International Child Abduction, Permanent Bureau of the Hague Conference (1993), reprinted in 33 I.L.M. 223, 233-234; Report of the Third Special Commission Meeting to Review the Operation of the Hague Convention on the Civil Aspects of International Child Abduction (17-21 March 1997).

Leading authorities on the interpretation of the Convention are also in disagreement with the principle enunciated in the *Croll* decision. Professors Paul Beaumont and Peter McEleavy, in their comprehensive book on the Convention, state that the "underlying principle should be that a veto over the removal of a child from its habitual residence should ordinarily amount to a right of custody, and its breach should be sufficient to successfully base a return petition." *See* Paul R. Beaumont and Peter E. McEleavy, The Hague Convention on International Child Abduction at 80 (1999). *See also* Linda Silberman, The Hague Child Abduction Convention Turns Twenty: Gender Politics and Other Issues, 33 N.Y.U.J. Int'l Law & Pol. 221,

228 (2000) ("the Second Circuit majority overlooked the Child Abduction Convention's quite self-conscious goal of creating an autonomous treaty definition for "custody rights" consistent with the structure and objectives of the Child Abduction Convention").

In sum, there is powerful authority to indicate that the Second Circuit Court of Appeals has departed from both the letter and spirit of the Convention in defining "custody rights" under the Hague Convention. The ruling has created a conflict with other U.S. courts' interpretation of the treaty and with decisions of the national courts of our treaty partners. It is critical that Supreme Court guidance be forthcoming at this time.

REASONS FOR GRANTING THE WRIT

I. The Second Circuit Majority Failed to Interpret the Hague Convention on the Civil Aspects of Child Abduction According To Appropriate Rules of Treaty Interpretation

The issue on which certiorari is requested involves an important interpretative question on a critical concept in the Hague Convention on the Civil Aspects of International Child Abduction. The United States ratified the Abduction Convention in 1988 and has obligations under the Convention to most of the 62 countries now party to the Treaty.[1]

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1. States that were members of the Hague Conference at the time of the adoption of the Abduction Convention "ratify" the Convention and ratifications must be respected by all Contracting States. Other countries can accede tot he Convention, but the Convention is only in effect between the acceding States and those Contracting States that accept the accession.

The basic obligation under the Abduction Convention requires that a child (up to the age of 16) who is wrongfully taken or removed from the country of habitual residence be returned in order that the courts in the habitual residence can determine the merits of the controversy. Such a wrongful removal or retention occurs when the removal is in violation of "custody rights" under the law of the habitual residence. More specifically, Article 3 of the Convention provides that the removal or retention of a child is "wrongful" where:

> (a) it is in breach of rights of custody attributed to a person institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and
>
> (b) at the time of removal or retention those rights were actually exercised either jointly or alone, or would have been so exercised but for the removal or retention.

In the case at bar, there was a *ne exeat* clause in a Hong Kong custody order, preventing the mother from removing the child from Hong Kong without the consent of either the father or the Hong Kong court. Since the child was removed from Hong Kong by the mother in violation of that order, the question presented is whether the ne exeat clause gives the father "rights of custody" under the Convention.

The interpretation of "custody rights" in the context of the Child Abduction Convention must be undertaken in light of the objects and purposes of that Convention. *See* Restatement (Third) of Foreign Relations Law § 325 (1) (1987) ("An international agreement is to be interpreted in

good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose"). *See also* Vienna Convention on the Law of Treaties, May 23, 1969, art. 31.1, 1155 U.N.T.S. 331, 340.

The panel majority adopted a simplistic and erroneous approach to determine the meaning of "custody rights" within the context of the Convention; they narrowly focused on a definition found in American dictionaries and concluded that custody was "something other and more than a negative right or veto". However, as dissenting Court of Appeals Judge Sonia Sotomayor pointed out, such parochial definitions are completely inappropriate in construing an international treaty.

This is particularly true in the context of the Abduction Convention where both the text and the official Report accompanying the Convention (the Perez-Vera Explanatory Report) attempted to create specific guidance in understanding and interpreting Convention concepts. For example, Article 5 of the Convention contains an autonomous definition for "rights of custody" as "rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence." It was understood by the Convention drafters that the domestic laws of different countries might view "custody rights" in different ways, with certain parental powers included in the phrase in some countries but not in others. Accordingly, the Convention sought to define as one constant component of the term the right to determine the child's residence. The Convention thus creates an autonomous treaty definition, quite apart from domestic law interpretations, of those circumstances which give rise to a breach of rights under the Convention warranting return. *See* Linda Silberman, Hague International

Hague International Child Abduction Convention: A Progress Report, 57 Law & Contemp. Probs. 209, 259 (1984). However, Article 5's emphasis on determining the child's place of residence was completely distorted by the majority in *Croll* and equated only with the ability of a custodial parent to determine residence.

The correct understanding of "custody rights" is also enhanced by looking to the official Report accompanying the Convention:

> This final Report must fulfill another purpose, viz. to supply those who have to apply the Convention with a detailed commentary on its provisions. Since the commentary is designed in principle to throw light upon the literal terms of these provisions, it will be concerned much less with tracing their origins than with stating their content accurately.

See Elisa Perez-Vera, Explanatory Report, in 3 Hague Conference on Private International Law, Actes and Documents of the Fourteenth Session, Child Abduction, 426, 427 (1982) (hereinafter Perez-Vera Report).

Specifically, the Report goes to great lengths to outline the factual circumstances which comprise "custody rights" and places special emphasis on the inclusion of the "right to determine the child's place of residence." *See* Perez-Vera Report, para. 84 at 452. In para. 71 at 447-448, the Report underscores that "the intention [of the Convention] is to protect *all* the ways in which custody of children can be exercised"; and urges in para. 67 at 446 "a flexible interpretation of the terms used, which allows the greatest

possible number of cases to be brought into consideration". As Judge Sotomayor emphasized in her dissent in *Croll*, given the basic purposes of the Abduction Convention and its international context, the right to determine the child's place of residence as regards international relocations must be understood as a right of custody within the meaning of the Convention.

Moreover, the *travaux preparatoires* of the Abduction Convention are additional evidence that a *ne exeat* clause confers custody rights upon the non-custodial parent with access rights. Such *travaux* are appropriate sources in interpreting international treaties. *See Air France v. Saks*, 470 U.S. 392 (1985). *See also* Restatement (Third) of Foreign Relations Law § 325 Reporters Note 1 (1987).

In debating various proposals submitted at the final diplomatic conference on the Abduction Convention in October 1980, the impact of a restriction on removal of a child from the jurisdiction was discussed. The following hypothetical was posed by Mr. Allan Leal of Canada:

> Custody is given to the mother, but the order provides that the child cannot go out of the jurisdiction without the father's consent. If the mother nevertheless leaves the jurisdiction without such consent, that constitutes wrongful removal.

Mr. van Boeschoten of the Netherlands noted that under the present terms of the Convention, the abducted child would have to be sent back immediately. Therefore, Mr. van Boeschoten saw no need to revise the present Article 3 to deal more expansively with rights of access. Mr. Eekelaar

(observer for the Commonwealth Secretariat) also expressed the view that a non-custodial parent with a right to be consulted about relocation would be covered in the present definition under Article 5.

See 3 Hague Conference on Private International Law, Actes and Documents, Fourteenth Session, Child Abduction, 266 (1982).

The above exchange sheds light on the important compromise in the Convention that provided non-custodial parents who had control over relocation with a "right of custody" triggering an obligation of return. The Second Circuit majority panel in *Croll* overlooked the *travaux preparatoires* and relied instead on a single law review article written in 1981 by Professor A.E. Anton,[2] expressing a personal view that giving or withholding consent to changes in a child's place of residence was not a breach of rights of custody in Article 3. Such a personal view should not be permitted to trump persuasive and contrary evidence as to the intention of the drafters of the Convention as a whole. In addition, as Judge Sotomayor observed in her dissent, other scholars have concluded that *ne exeat* rights do constitute "rights of custody" under the Convention, citing Paul R. Beaumont & Peter E. McEleavy, The Hague Convention on International Child Abduction 72-73 (1999) ("If an individual is a child's sole custodian there are, prima facie, no restrictions on him relocating with that child. If there *are* such restrictions, that implies that the custody right must in some way be limited. Where this is so it must be that another body or individual holds a corresponding right in relation to

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2. *See* A.E. Anton, The Hague Convention on International Child Abduction, 30 Int'l & Comp. L.Q. 537, 546 (1981).

the child. Therefore, should the primary carer remove the child abroad, . . . he would have breached the custody rights of the other party, if their consent had been sought"); Linda Silberman, "Custody Orders Under the Hague Abduction Convention," in A New Vision for a Non-Violent World: Justice for Each Child (Proceedings of the 4th Biennial International Conference of the International Association of Women Judges, 1999), at 236 (arguing that in cases of non-removal order violations, "a failure to recognize the Convention remedy of return would be inconsistent with the careful compromise [between custody and access rights] that the Convention definition [of custody rights] has put in place.") *See also* Linda Silberman, The Hague Child Abduction Convention Turns Twenty: Gender Politics and Other Issues, 33 J. of Int'l. Law & Pol. 221, 228 (2000) ("the Second Circuit majority overlooked the Child Abduction's quite self-conscious goal of creating an autonomous treaty definition for "custody rights" consistent with the structure and objectives of the Child Abduction Convention").

Finally, Special Commissions have met on four occasions to review the operation of the Abduction Convention and have examined the issue of "custody rights" at these meetings. In 1989, the Commission reached overall conclusions published at 29 ILM 219 (1990) and alluded to litigation that had arisen concerning "rights of custody" under the laws of various countries. The Special Commission confirmed that "rights of custody" constitute an autonomous concept and that such rights were not necessarily coterminous with rights referred to as "custody rights" created by the law of any particular country or jurisdiction thereof.

A Second Special Commission met again in 1993, and discussed the specific issue of whether *ne exeat* clauses when combined with access rights created "custody rights" in the parent who did not have primary care and control of the child. The Report of the Second Special Commission reflected the view of the majority of represented States that such restrictions on removal did create "custody rights" under the Convention.[3] *See* Report of the Second Special Commission Meeting to Review the Operation of the Hague Convention on the Civil Aspects of International Child Abduction, reprinted in 33 I.L.M. 225, 234 (1994). *See also* Hon. James D. Garbolina, International Child Custody Cases: Handling

3. The Second Special Commission discussed the decision of a provincial trial court in France, the Tribunal de grande instance de Perigueux (Ministere Public c. Mme Y., March 17, 1992), which was apparently never appealed and which conflicted with a prior ruling by a French appellate court in Aix-en-Provence, published in French at 79 Revue critique de droit international prive 529 (1990). The Second Special Commission described the lower court ruling by the Perigueux court in 1992 as having "gathered no support". Curiously, that "discredited" ruling was relied upon by the *Croll* majority to show that foreign courts "are split on the issue" of the impact of *ne exeat* clauses. But the Report of the Second Special Commission observed as follows:

> . . . the view expressed by the Tribunal de Grande Instance de Perigueux in the case cited in the Checklist, to the effect that an order of the court granting custody which prohibited the custodian from removing the child from the court's jurisdiction without consent of the other parent constituted only a "modality" attached to the right of custody and not a situation of joint custody, fathered no support. This view had been rejected by the Cour d'appel d'Aix-en-Provence, as well as by courts in Austria. Australia, the United Kingdom and the United States of America.

Hague Convention Cases in U.S. Courts 121 n.262 (3d ed. 2000).

The Report of the Third Special Commission in 1997 made only passing reference to the problem, noting in paragraph 15 the Supreme Court of Canada decision in *Thomson v. Thomson,* [1994] 119 D.L.R. (4th) 253, 276-81 (Can.), where the Canadian Supreme Court held that the removal of a child from Scotland by the custodial parent, contrary to a non-removal clause in an interim or temporary order, was wrongful and breached custody rights "retained by the Scottish court".

The most recent meeting of the Fourth Special Commission at the Hague in March 2001 has not yet yielded a full Report. However, certain Conclusions and Recommendations have issued. In Part IV, the section on interpretation, the Fourth Special Commission urged two points that are particularly relevant in this matter: (1) that the Convention should be interpreted having regard to its autonomous nature and in the light of its objects and (2) that the Explanatory Report by Elisa Perez-Vera is of continuing importance as an aid to the interpretation and understanding of the Convention. *See* Conclusions and Recommendations of the Fourth Meeting of the Special Commission to Review the Operation of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction (22-28 March 2001).

Thus, the language and purposes of the Abduction Convention, the official Explanatory Report accompanying the Abduction Convention, the *travaux preparatoires*, and the ongoing superintendence by the Special Commissions to the Hague Conference on Child Abduction indicate

overwhelmingly that the interpretation of the concept of "custody rights" by the majority of the Second Circuit in a 2-1 panel split was wrong and extremely parochial. No Hague Convention case has yet come before the Supreme Court of the United States, but the concept of "custody rights" is critical to the operation of the Convention. Accordingly, this case calls for a grant of certiorari by the Court.

II. The Decision in *Croll* Creates a Conflict With Decisions in Other U.S. Courts Over the Interpretation of "Custody Rights" Within the Meaning of the Child Abduction Convention

Both state and federal courts have responsibility for hearing applications for return of a child under the Abduction Convention. 42 U.S.C. § 11603(a). Accordingly, both state and federal courts are confronted with questions of how to interpret the Convention and the meaning of key concepts. Because the return obligation turns on the basic question of whether there has been a breach of "custody rights" under Convention, a correct and uniform interpretation of "custody rights" is critical to the operation of the Convention.

The panel majority's decision in *Croll* has created a conflict with rulings by other courts in the United States that have faced the question of whether a *ne exeat* clause creates "custody rights" under the Convention. Moreover, since the interpretation of a treaty is federal law and binding on state courts, the decision in *Croll* will have enormous effect on state courts presented with a similar issue. Until the ruling in *Croll*, the state courts had consistently held that custody orders that contained *ne exeat* clauses conferred "custody rights" on the otherwise non-custodial parent. *See David S. v. Zamira S.*, 151 Misc. 2d 630, 574 N.Y.S.2d

429 (N.Y. Fam. Ct. 1991); *Janakakis-Kostun v. Janakakis*, 6 S.W.3d 843 (Ky. Ct. App. 1999), *cert. denied*, 121 S. Ct. 32 (2000); *D'Assignies v. Escalante*, No. BD 051876 (Cal. Super. Ct. Dec. 9, 1991; www.incadat.com ref.: HC/E/USs 198 (available in full on INCADAT).

In each of these cases, various types of *ne exeat* clauses were all found to create "custody rights" under the Convention obligating the parent in violation of the clause to return the child for further proceedings in the state of habitual residence. In a 2-1 ruling in *Croll* the Second Circuit Court of Appeals, decided otherwise. The importance and influence of this contrary ruling by the Second Circuit cannot be overestimated. The comprehensive, scholarly, and robust dissent by Judge Sotomayor in *Croll* is an additional compelling reason for review of this question now by the Supreme Court.

Whether or not the Hague Convention will provide a remedy for a left-behind parent in the many cases involving court orders restraining removal of children, either in interim or final custody orders, is a fundamental and important aspect of the Convention. The Hague Abduction Convention is in its twenty-first year and has been operative in the United States since 1988. No case has yet come before the Supreme Court of the United States, but the question presented by the 2-1 split decision in *Croll* is one that commands its attention.

III. The Second Circuit Ruling Is Inconsistent with International Case Law Interpreting "Rights of Custody" Under the Hague Child Abduction Convention

In construing the terms of an international treaty, the Supreme Court of the United States has found "the opinions of our sister signatories to be entitled to considerable weight." *See Air France v. Saks*, 470 U.S. 392, 494 (quoting *Benjamins v. British European Airways*, 572 F.2d 913, 919 (2d Cir. 1978).

The panel majority in *Croll* characterized the foreign case law as "split on the issue presented in this case" and stated that they were not aware of any doctrine "requiring our deference to a series of conflicting cases from foreign signatories". Appendix A, p. 22a. But as Judge Sotomayor demonstrated in her thorough and careful dissent, the case law from other countries overwhelmingly supports the proposition that "rights of custody" are implicated where a custody order vests either a parent or the court with the power to remove to relocate a child to another country. *See also* Linda Silberman, The Hague Child Abduction Convention Turns Twenty: Gender Politics and Other Issues, 33 N.Y.U. J. of Int'l. Law and Pol. 221, 288 (majority in *Croll* ignored compelling authority with respect to both the case law and scholarship as well as to the interpretation of the Convention approved by Hague Special Commissions on the Convention).

For example, in *C. v. C.* [1989] 2 All E.R. 465 (Eng. C.A. Dec. 14, 1988), an Australian decree granting "custody to the mother and "joint guardianship" to both parents was found to create "custody rights" since the order gave the

father the right to determine the child's place of residence. Indeed, the first Special Commission Meeting to Review the Operation of the Hague Convention stressed the importance of this ruling in its Overall Conclusions, *see* 29 I.L.M. 219 (1990), in sensitizing authorities in various countries to the fact that the award of what is called "custody" to only one parent under domestic law does not necessarily mean that all "rights of custody" within the intent of the Hague Convention have been granted to that parent.

The Israeli High Court of Justice also found that a parent whose consent was required before the child could be removed from the country had "custody rights" within the meaning of the Convention. *See* C.A. 5271/92 *Foxman v. Foxman* (H.C. 1992) (Isr.). And the Australian courts have held that a custody order that provided reciprocal *ne exeat* rights for both parents created "rights of custody" in the otherwise non-custodial father. *See In the Marriage of: Jose Garcia Resina and Muriel Ghislaine Henriette Resina*, Appeal No. 52, 1991 (Fam. Austl.)

The view of the German courts on this issue was reported in an opinion of a federal district court faced with subsequent litigation after a child removed from the United States had been ordered returned to the United States by a German court. *See Morton v. Morton*, 982 F. Supp. 675 (D. Neb. 1997). In explaining the German court's determination that the father had "custody rights" under the Hague Convention on the basis of a restriction on removal of the child from the United States, the district judge quoted from the German court's opinion:

> Even one who has only the right to object to the taking of the child to a foreign country has

> custody rights as per Article 3 and 5 of the Hague [C]onvention. Under the Hague Convention, the restriction on mobility connected therewith is to be accepted. The state of origin can and will, protect the right of the other parent beyond the right of mere visitation with such restrictions.

982 F. Supp. at 683-684.

More recently, the Constitutional Court of South Africa in *Sonderup v. Tondelli* (SA 2000) No CCR 53/00 ordered the return of a child to Canada pursuant to a *ne exeat* order. The mother was granted sole custody and the father access rights in an order of the court of British Columbia. The order also provided that neither parent could remove the child from British Columbia without further order of the court or the written agreement of the parties. When the mother removed the child to South Africa without the requisite consent, the father petitioned for return of the child to Canada under the Abduction Convention. In rejecting the mother's contention that the father did not have "custody rights" under the Convention, the South African court disapproved the majority opinion in *Croll* as "contrary to the weight of authority that a non removal provision does not found a right of custody." In approving the approach taken by Judge Sotomayor in dissent, the South African court point to her reasoning that "when a parent takes a child abroad in violation of *ne exeat* rights, that parent effectively nullifies the custody order of the country of habitual residence — exactly the mischief the Convention seeks to avoid."

In the face of these landmark rulings from other countries, the panel majority in *Croll* found support for its holding in an unappealed ruling of a local French court,

see Ministere Public v. Mme Y., Tribunal de Grande Instance de Perigueux, Mar. 17, 1992, which itself is in tension with an earlier decision of a French appellate court in another region of France, *see Ministere Public v. Mme B, Cour d'appel d'Aix-en Provence* (Mar. 23, 1989). Indeed, the Second Special Commission reviewing the operation of the Abduction Convention expressly mentioned the Aix-en Provence appellate decision and observed that the lower Perigueux court ruling "gathered no support" and had been rejected by courts in Austria, Australia, the United Kingdom and the United States of America. *See* 33 I.L.M. 225, 233-34 (1993).

The panel majority in *Croll* also relied on dicta in two Canadian Supreme Court cases to support its result, but the Canadian courts themselves have reached a result contrary to *Croll* in similar circumstances. *See Thorne v. Dryden-Hall* (1997), 28 FRL (4th) 297 (Brit. Col.) (residence order to mother where there was restriction on removal created "custody rights" in the father under the Convention). Interestingly, in both Canadian Supreme Court cases, *Thomson v. Thomson* [1994] 119 D.L.R. (4th) 253 and *D.S. v. V.W.* [1996] 134 D.L.R. (4th) 481, an order of return of the child was in fact upheld. In *Thomson*, the child had been taken by the custodial mother from Scotland to Canada in violation of a *temporary ne exeat* order issued by the Scottish court. The Supreme Court of Canada found that the interim order had vested the Scottish court with "rights of custody", that the mother had breached those rights, and that return was required. However, the Court in dicta raised the possibility that a permanent *ne exeat* clause would not create such a right of custody under the Convention. The second case, *D.S. v. V.W.*, determined that an *implicit* restriction on movement was insufficient to confer "custody rights", but

the child was nonetheless returned under the relevant domestic provincial law. One Justice in *D.S. v. V.W.* suggested in dicta that even an *explicit* non-removal clause would not give an access parent a "right of custody" under the Convention, but six of the nine Justices expressed reservations about such an analysis of custodial rights and obligations under the Convention. Subsequently, in *Thorne v. Dryden-Hall* (1997), 28 FRL (4th) 297 (Brit. Col.),[4] the view of those six Justices was deemed controlling, and the British Columbia Court of Appeal ruled that a permanent *ne exeat* clause in an English court order was sufficient to create "custody rights" under the Convention. Thus, the Court in British Columbia has itself reached the same conclusion as dissenting Judge Sotomayor on the impact of *ne exeat* clauses and has rejected the read of the Canadian Supreme Court cases by the panel majority in *Croll*. The approach adopted in *Thorne* and by Judge Sotomayor has also been endorsed by scholars in both the United States and Canada. *See* Martha Bailey, "Rights of Custody" Under the Hague Convention," 11 B.Y.U. J. Pub. L. 33, 42-50 (1997); Linda Silberman, "Custody Orders Under the Hague Abduction Convention", *supra* at 235-240.

A close look at the international case law shows that it is far from "split" and that the meager authority in support of the majority position in *Croll* is founded on largely discredited dicta or an unappealed ruling that "gathered no support". To allow the *Croll* ruling to stand without examination by the Supreme Court would be enormously disruptive to the operation of the Convention both within and without the United States.

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4. The *Thorne* case was not cited or discussed by either the majority or the dissent in *Croll*.

CONCLUSION

For these reasons, a writ of certiorari should be issued to review the opinion and judgment of the Court of Appeals.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DATED AND DECIDED SEPTEMBER 20, 2000

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 1999
(Argued: February 22, 2000 Decided: September 20, 2000)
Docket No. 99-9341

STEPHEN HALLADAY CROLL,

Petitioner-Appellee,

— v. —

MEI YEE CROLL,

Respondent-Appellant.

Before:

JACOBS, SOTOMAYOR, and MICHEL,*
Circuit Judges.

Appeal from a final judgment of the United States District Court for the Southern District of New York (Sidney H. Stein, Judge), denying appellant's motion to dismiss appellee's petition for return of the parties' minor child to Hong Kong under the Convention on the Civil Aspects of International Child Abduction, and granting appellee's application for an order of return.

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* The Honorable Paul R. Michel, of the United States Court of Appeals for the Federal Circuit, sitting by designation.

Appendix A

Reversed and Remanded.

Judge Sotomayor dissents in a separate opinion.

* * *

JACOBS, *Circuit Judge*:

Petitioner-appellee Stephen Halladay Croll seeks an order compelling his wife, respondent-appellant Mei Yee Croll, to return their minor child, Christina Croll, to Hong Kong under the Hague Convention on the Civil Aspects of International Child Abduction, *done* Oct. 25, 1980, T.I.A.S. No. 11670, 1343 U.N.T.S. 89, *reprinted in* 51 Fed. Reg. 10,494 (1986) ("Hague Convention" or "Convention"), implemented by the International Child Abduction Remedies Act (ICARA), 42 U.S.C. § 11601 *et seq.* (1995). A custody decree issued in Hong Kong (a) confers the sole "custody, care and control" of Christina Croll on her mother, (b) confers "rights of access" on her father, and (c) bars the removal of the child from Hong Kong without the consent of the other parent or the court. The United States District Court for the Southern District of New York (Stein, *J.*) granted Mr. Croll's petition for an order of return subject to certain conditions, finding that Mrs. Croll had wrongfully removed Christina from Hong Kong in violation of the Convention. *See Croll v. Croll*, 66 F. Supp. 2d 554, 562-63 (S.D.N.Y. 1999).

We hold that rights of access do not constitute rights of custody within the meaning of the Hague Convention, even when coupled with a *ne exeat* clause. Because courts in the United States have jurisdiction to enforce the Convention by ordering a child's return to her habitual residence *only* if

the child has been removed in breach of a petitioning parent's *custodial* rights, the district court lacked jurisdiction to order return in this case.

BACKGROUND

A. *Facts*

Stephen and Mei Yee Croll, both United States citizens, were married in Hong Kong in 1982. Their daughter Christina was born in Hong Kong in 1990 and lived with both of her parents until they separated in 1998. While the separated couple remained in Hong Kong, Christina lived with her mother, and was regularly visited by her father.

At some point in 1998, Mr. Croll commenced divorce proceedings in the District Court of the Hong Kong Special Administrative Region, Matrimonial Causes. The custody order issued by the Hong Kong court — the only custody order applicable to this case — grants Mrs. Croll sole "custody, care and control" of Christina and grants Mr. Croll a right of "reasonable access." *Croll v. Chiu*, No. 7211 of 1998, Order at 1 (Dist. Ct. H.K. Spec. Admin. Reg., Feb. 23, 1999). To aid the parties' rights under the Custody Order (Mrs. Croll's custody and Mr. Croll's access), a separate paragraph directs that Christina "not be removed from Hong Kong until she attains the age of 18 years" without leave of court or consent of the other parent. Mr. Croll contends that this *ne exeat* clause (set out in full in the margin[1]), which

1. The custody order's *ne exeat* clause provides that Christina be not removed from Hong Kong without leave until she attains the (Cont'd)

grants a veto power over any place of residence outside Hong Kong, gives him rights of custody within the meaning of the Convention.

Mrs. Croll brought Christina to New York on April 2, 1999, intending (she says) that Christina would interview at schools in New York City, attend school for a few weeks, and then return to Hong Kong for the summer. But (Mrs. Croll admits) "[i]n the back of her mind" she intended to remain in the United States permanently. On April 8, 1999, Mrs. Croll filed an action in Family Court in New York County seeking custody, child support, and an order of protection. Those proceedings have been stayed pending the outcome of this federal action.

When Mr. Croll returned to Hong Kong from a business trip on April 7, 1999, he learned that his wife had gone with Christina to the United States. On April 22, 1999, Mr. Croll filed a missing persons report with the police in Hong Kong, and on May 14, 1999, he filed this petition in the Southern District of New York seeking Christina's return to Hong Kong pursuant to the Hague Convention.

B. *Prior Proceedings*

Mr. and Mrs. Croll do not dispute that Christina, who lived in Hong Kong from her birth until arriving in

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(Cont'd)
age of 18 years but provided that if either parent to give a general undertaking to the Court to return the said child to Hong Kong when called upon to do so, and unless otherwise directed with the written consent of the other parent that parent, may remove the said child from Hong Kong for any period specified in such written consent.

Appendix A

New York in 1999, was "habitually resident" in Hong Kong within the meaning of Article 3 of the Convention. In addition, Mrs. Croll does not claim on appeal that any of the Convention's recognized exceptions to the petitioning parent's right of return apply here. The question in this case therefore is whether Mr. Croll held and actively exercised "rights of custody" — within the meaning of the Convention — when Christina was taken from Hong Kong.

Mrs. Croll moved in the Southern District to dismiss the petition on the ground that Mr. Croll could not claim "custody" of Christina and that therefore (a) the court lacked subject matter jurisdiction and (b) the petition failed to state a claim upon which relief could be granted. The court denied the motion to dismiss, granted Mr. Croll's petition, and ordered that Christina be returned to Hong Kong. The court reasoned that

> the Hong Kong order dated February 23, 1999 provides that Christina may not be removed from Hong Kong before her 18th birthday without either leave of court or both parents' consent. Accordingly, . . . Mr. Croll had a right, along with respondent, to determine Christina's place of residence and he had a corresponding right of custody within the meaning of the Convention. Christina's removal from Hong Kong — her habitual residence — was in violation of her father's right of custody and was, therefore, wrongful pursuant to the Convention.

Croll, 66 F. Supp. 2d at 559. The court granted Mrs. Croll's motion to stay its order of return pending expedited appeal to this Court. *See Croll v. Croll*, No. 99-3566 (S.D.N.Y. Oct. 29, 1999).

DISCUSSION

At issue on this appeal are two sets of rights recognized in the Convention to be distinct: rights of custody and rights of access. If Mr. Croll has custody rights, courts in the United States have jurisdiction to order return of Christina to Hong Kong, as the district court has done, and the duty to do so. If, however, Mr. Croll has the lesser rights of access, jurisdiction is lacking and Mr. Croll must rely on other remedies.

The proper interpretation of the Hague Convention is an issue of law, which we review *de novo*. *See Klos v. Polskie Linie Lotnicze*, 133 F.3d 164, 167 (2d Cir. 1997).

"In construing a treaty, as in construing a statute, we first look to its terms to determine its meaning." *United States v. Alvarez-Machain*, 504 U.S. 655, 663 (1992) (citing *Air France v. Saks*, 470 U.S. 392, 397 (1985), and *Valentine v. United States ex rel. Neidecker*, 299 U.S. 5, 11 (1936)); *see also Kahn Lucas Lancaster, Inc. v. Lark Int'l Ltd.*, 186 F.3d 210, 215 (2d Cir. 1999) ("Treaties are construed in much the same manner as statutes.") (citing *Alvarez-Machain*, 504 U.S. at 663)). The text of the treaty must be interpreted "in accordance with the *ordinary meaning* to be given to the terms of the treaty in their context and in light of its object and purpose." Vienna Convention on the Law of Treaties,

done May 23, 1969, art. 31.1, 1155 U.N.T.S. 331 (emphasis added). Where the text — read in the context of its structure and purpose — is ambiguous, we may resort to extraneous tools of interpretation such as a treaty's ratification history and subsequent operation. *See Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176, 180 (1982) ("The clear import of treaty language controls unless application of the words of the treaty according to their obvious meaning effects a result inconsistent with the intent or expectations of its signatories.") (internal quotation marks and citations omitted); *cf. Chan v. Korean Air Lines, Ltd.*, 490 U.S. 122, 134 n.5 (1989) ("Even if the text were less clear, its most natural reading could properly be contradicted only by clear drafting history.").

So far as we can tell, we and the district court in this case are the only courts in the United States to consider whether rights of access coupled with a *ne exeat* clause confer "custodial rights" on a non-custodial parent within the meaning of the Hague Convention. We therefore start from scratch, and consult (A) the purpose and design of the Convention, (B) its wording, (C) the intent of its drafters, and (D) caselaw in other signatory states.

A. *Purpose and Framework of the Convention*

The Hague Convention, to which the United States and Hong Kong are signatories,[2] was adopted as an effort "to

2. The Convention remains in effect in Hong Kong following Hong Kong's absorption into the People's Republic of China in 1997. *See* Joint Declaration on the Question of Hong Kong, Dec. 19, 1984, (Cont'd)

protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence, as well as to secure protection for rights of access." Hague Convention, Preamble, 51 Fed. Reg. at 10,498. The Convention rests on the principle that a child's country of "habitual residence" is "best placed to decide upon questions of custody and access." Elisa Pérez-Vera, *Explanatory Report: Hague Conference on Private International Law, in* 3 Acts and Documents of the Fourteenth Session (Child Abduction) 426, 434-35, ¶ 34 (1980) ("Pérez-Vera Report").[3]

In order to "preserve the status quo and to deter parents from crossing international boundaries" to secure a more favorable forum for the adjudication of custody rights,

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(Cont'd)
U.K.-P.R.C., U.K.T.S. No. 26 (1985) ("Joint Declaration"). The Joint Declaration provides that "[i]nternational agreements to which the People's Republic of China is not a party but which are implemented in Hong Kong may remain implemented in the Hong Kong Special Administrative Region." *Id.* Annex I, pt. XI. The People's Republic of China is not a signatory to the Hague Convention, but on June 13, 1997, that country informed the Ministry of Foreign Affairs of the Kingdom of the Netherlands at the Hague that, in accordance with the Joint Declaration, the Convention would continue to apply to Hong Kong after July 1, 1997.

3. The Pérez-Vera Report is recognized by the Hague Conference as "the official history and commentary on the Convention," and we have previously said that it is an authoritative source for interpreting the Convention's provisions. *Blondin v. Dubois*, 189 F.3d 240, 246 n.5 (2d Cir. 1999).

Appendix A

Blondin v. Dubois, 189 F.3d 240, 246 (2d Cir. 1999) (internal quotation marks omitted), the Convention provides for the return of children "wrongfully removed to or retained in any Contracting State." Hague Convention, art. 1, 51 Fed. Reg. at 10,498. A removal or retention is to be considered "wrongful" where:

> a) it is in breach of *rights of custody* attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; *and*
>
> b) at the time of removal or retention those rights were *actually exercised,* either jointly or alone, or would have been so exercised but for the removal or retention.

Id. art. 3, 51 Fed. Reg. at 10,498 (emphasis added). Rights of custody " may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State." *Id.*

Thus an order of return is available as a remedy *only* for wrongful removals or retentions, and removals or retentions are wrongful *only* if they are "in breach of rights of custody." The Convention defines rights of custody as "rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence." *Id.* art. 5, 51 Fed. Reg. at 10,498.

Appendix A

Rights of custody are distinguished from *rights of access*, which are defined in the Convention as "the right to take a child for a limited period of time to a place other than the child's habitual residence." *Id.* The Convention provides recourse in the event a child is removed from an habitual residence in breach of access rights, but those remedies *do not* include an order of return to the place of habitual residence. *See id.* art. 21, 51 Fed. Reg. at 10,500. To vindicate the breach of access rights, the Convention authorizes signatory nations to use one or more remedies (short of return) to "promote the peaceful enjoyment of access rights," and to "take steps to remove, as far as possible, all obstacles to the exercise of such rights." *Id.* One such remedy is a writ ordering the custodial parent who has removed the child from the habitual residence to permit, and to pay for, periodic visitation by the non-custodial parent with access rights. *See id.* art. 26, 51 Fed. Reg. at 10,500; *Viragh v. Foldes*, 612 N.E.2d 241, 246-50 (Mass. 1993) (ordering a custodial parent who brought a child to the United States in frustration of a Hungarian access decree to pay the travel costs of visitation). The Convention makes plain that unless the petitioner has rights of custody, a court has no authority to order return.

In the United States, a petitioner claiming wrongful removal under the Convention may bring a petition for an order of return in a United States district court or in a court of any state. *See* 42 U.S.C. § 11603(a), (b). The court has the authority only to determine whether the child's removal was "wrongful" within the meaning of the Convention, *i.e.*, whether the removal "was in breach of custody rights" held by the petitioner. *See id.* § 11603(e)(1)(A). The petitioner bears the burden of proving "wrongful removal"

by a preponderance of the evidence. *See id.* § 11603(e)(1). If the petitioner shows that the child was wrongfully removed, the court must order the child's return to the country of habitual residence unless the respondent demonstrates that one of four narrow exceptions apply. *See id.* § 11601(a)(4); *Blondin*, 189 F.3d at 245-46 (discussing enumerated exceptions). The court is not permitted to consider the merits of underlying custody disputes. *See id.* § 11601(b)(4).

B. *Wording of the Convention*

We open the dictionary to find the ordinary meaning or meanings of "custody." *See Chan*, 490 U.S. at 128 (looking first to Webster's Second International Dictionary to construe "irregularity" under the Warsaw Convention). Dictionaries support the idea that custody entails care, and in any event confirm the intuition that custody is something other and more than a negative right or veto.

Black's Law Dictionary defines custody generally as "[t]he care and control of a thing or person for inspection, preservation or security"; parental custody as "[t]he care, control, and maintenance of a child awarded by a court"; sole custody as "[a]n arrangement by which one parent has full control and responsibility to the exclusion of the other"; and joint (or shared) custody as "[a]n arrangement by which both parents share the responsibility for and authority over the child at all times." *Black's Law Dictionary* 390 (7th ed. 1999); *see, e.g.*, *Joyner v. Dumpson*, 712 F.2d 770, 778 (2d Cir. 1983) ("[L]egal custody is concerned with the rights and duties of the person (usually the parent) having custody

to provide for the child's daily needs — to feed him, clothe him, provide shelter, put him to bed, send him to school, see that he washes his face and brushes his teeth." (quoting *Smith v. Organization of Foster Families for Equality & Reform*, 431 U.S. 816, 827 n.17 (1977) (internal quotation marks omitted))).

Webster's Third defines custody as a "duty of guardianship and preservation . . . protection, care, maintenance, and tuition." *Webster's Third New International Dictionary Unabridged* 597 (1986). The *Random House* dictionary defines custody as "keeping; guarding; care: *in the care of her father.*" *Random House Dictionary of the English Language* 357 (2d ed. 1987) (emphasis in original).

Taking these definitions together, custody of a child entails the primary duty and ability to choose and give sustenance, shelter, clothing, moral and spiritual guidance, medical attention, education, etc., or the (revocable) selection of other people or institutions to give these things. The dissent characterizes this as a "parochial definition" that reflects only "traditional American notions of custody rights," because it is distilled from American lexical sources. *Post* at 6253. But this definition reflects none of the peculiar practices of American child-rearing; it includes an open-ended "etc."; and the dissent identifies no feature of custody that is missing except for the dubious addition of a *ne exeat* clause.

Nothing in the Hague Convention suggests that the drafters intended anything other than this ordinary understanding of custody. Article 5 of the Convention defines

"rights of custody" generally as "*rights* relating to the *care of the person* of the child." Hague Convention, art. 5, 51 Fed. Reg. at 10,498 (emphasis added). The plural "rights" references a bundle of rights exercised by one or more persons having custody, and is in some tension with the idea (critical to the district court's opinion in this case) that one can have custody by holding a *single* power such as the veto conferred by a *ne exeat* clause.

Mr. Croll emphasizes that the Convention's definitional phrase "rights relating to the care of the person of the child" continues immediately to offer as an example, "in particular, the right to determine a child's place of residence." Hague Convention, art. 5, 51 Fed. Reg. at 10,498. Mr. Croll reasons that a *ne exeat* clause gives an otherwise non-custodial parent a power that amounts to a "right to determine the child's place of residence" and thereby creates a "right of custody" that is protected by the Convention's return remedy.

We disagree. The right to determine the "place of residence" is an apt example of a right of custody because it is indicative: the parent who decides where the child dwells is very likely to be the parent who exercises care and control, and therefore has custody. It is unhelpful and insufficient to think about the custodial right to designate a child's "place of residence" in terms of the power to pick her home country or territory. Such a power protects rights of custody and access alike, and is no clue as to who has custody. Every roof is in some country, territory or jurisdiction. A child may be profoundly affected by the ambient culture and regime of a particular country, but "place of residence," *as a signal example of parental control over care and upbringing*,

necessarily entails more specific choices. A custodial parent cannot discharge the responsibility of deciding a child's "place of residence" by picking a country or territory. Depending on many considerations, the custodial parent must place the child in a city, suburb, or countryside; in a particular dwelling unit at some address; at home, or in a boarding school, finishing school, military academy, or institution. These choices are unavoidable for a parent who exercises the custodial right to fix the residence of a child.

The wording of the "place of residence" example buttresses our interpretation of Article 5. The right specified is the "right to *determine*" a child's place of residence, thereby implying an active power to choose (and change) the residential address, at will, as a matter of parental and personal judgment. *See Webster's Third* at 617 (defining "determine" as "to settle or decide by choice of alternative possibilities; to direct or control the end or course of"); *Random House* at 393 (defining "determine" as "to cause, affect or control; to fix or decide causally; to settle or decide by an authoritative or conclusive decision").

The *ne exeat* clause limits Mrs. Croll's custodial power to expatriate Christina, but it does not suggest that the power to "determine" Christina's "place of residence" (in Hong Kong, New York, or anywhere else) is also Mr. Croll's. The Custody Order gives Mr. Croll a veto power only — and only over Christina's expatriation — but gives him no say over any other custodial issue, including Christina's "place of residence" *within* Hong Kong. That single veto power, even if leveraged, falls short of conferring a joint right to determine the child's residence, particularly since an earlier

clause in the custody order awards "custody care and control" *solely* to the mother.[4]

Just as important, Article 3's definition of "wrongful removal" requires that for a child's removal to be "wrongful" (and a return remedy available) the removal must be in breach of custodial rights of the petitioning parent that "were *actually exercised . . . or* would have been so exercised *but for the removal.*" Hague Convention, art. 3, 51 F. Reg. at 10,498 (emphasis added); *see also* Department of State, Hague International Child Abduction Convention; Text and Legal Analysis, 51 Fed. Reg. at 10,507 (to invoke a return remedy applicants must "provide some preliminary evidence that he or she actually exercised custody of the child, for

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4. The dissent calls this veto a "significant decisionmaking power" tantamount to custody, *post* at 6252, but that characterization proves too much: if Mr. Croll has custody by virtue of that veto, so does the Hong Kong court. Although the Convention recognizes that an "institution or other body" may hold custody rights, nothing suggests that this child, with two living parents, is a ward of the court.

The dissent discusses with seeming approval the view of an English court that whenever a court enters a custody order, the court itself may be taking on rights of custody. *See post* at 6264-65. That approach would of course require that every violation of the home court's decree, including expatriation in derogation solely of parental rights of access, would be deemed a violation of custody rights (of the court) and compel the child's return. Not a bad idea, perhaps, but this idea is not found in the Convention, which expressly distinguishes between custodial rights and access rights, and affords the remedy of mandatory return to enforce the former but not the latter.

instance, took *physical care* of the child." (emphasis added)); Pérez-Vera Report ¶ 73, at 448 (same). The right conferred by the *ne exeat* clause is not one that Mr. Croll "actually exercised," and it is circular to say that he would have exercised it *but for* Christina's removal, because the right itself concerns nothing but removal itself, and would never have been exercised had Mrs. Croll been content to stay in Hong Kong during Christina's minority.[5]

Therefore, we find the power to determine the child's place of residence, considered in context as part of a definition of custody rights, to be an example of the powers, choices and arrangements entailed by the care of the child. A *ne exeat* clause, by contrast, confers only a veto, a power in reserve, which gives the non-custodial parent no say (except by leverage) about any child-rearing issue other than the child's geographical location in the broadest sense.

If we were to enforce rights held pursuant to a *ne exeat* clause by the remedy of mandatory return, the Convention would become unworkable. A foundational assumption in the Convention is that the remedy of return will deliver the child to a custodial parent who (by definition) will receive *and care for* the child. It does not contemplate return of a child to a parent whose sole right — to visit or veto — imposes no duty to give care.

In this case, for example, the custody order places all the burdens of care and custody on Mrs. Croll, and none of them on Mr. Croll. If return were ordered, perhaps Mrs. Croll

5. We reach this issue — which bears on subject-matter jurisdiction — *sua sponte*.

(an American citizen) would expatriate herself to the People's Republic of China in order to care for her daughter; and if she does not, Mr. Croll probably will arrange for his daughter's care. But an order of return does not require Mrs. Croll to return with Christina; the Hong Kong custody decree does not require Mr. Croll to take care of the child day-to-day; we lack discretion to withhold return of a child who has been wrongfully removed; and the Convention does not allow us to alter the custodial arrangements ordered by the court in Hong Kong. Given those mandated strictures, we cannot plausibly read the Convention to compel the removal of a child from a parent who exercises all rights of care to a country in which no one has that affirmative power or duty.

The dissent points out that the Convention undoubtedly compels return of a child (accompanied or not by the parent who took her abroad) even (i) to a parent with joint custody who may receive the child upon repatriation at a time of year when custody would ordinarily be exercised by the parent who may remain abroad, or (ii) to a parent who exercises custody rights by decisional power without day-to-day care. *See post* at 6259-61. In the first case, the child is returned to a parent who gives day-to-day care in season and who can be expected to have the facilities, resources, fitness, and inclination to give care out of season as well; in the latter case, the decision-making parent can decide in what school or in whose care the child can be placed. The dissent's analysis, however, would compel the return of the child to a parent who lacks the right or responsibility to give care or to decide who should give it, or even to a parent with access who has been found unfit to have custody.

The custodial parent who expatriates the child in violation of a court order may elect to stay abroad, if only to avoid contempt proceedings; yet the dissent construes the Convention to compel return of the child to a country in which the only parent has no duty to give care and no power except to compel the return and enjoy occasional access. The dissent offers the reassurance, however, that such a child would not be neglected because "a parent's duty to care for a child" may be imposed by "the law of the country of habitual residence." *Post* at 6259. No doubt, family courts in the United States would impose that obligation as a matter of family law — though of course a court cannot confer competence or fitness — but on this point the dissent is generalizing from local American law; and even if we assume that courts anywhere can in a pinch confer custodial rights and duties on the local parent if the custodial parent remains abroad, the effect of compelling return on that assumption would be to alter custody rights rather than to enforce them.

Every textual and structural feature of the Convention suggests that a parent who furnishes no custodial care cannot establish "wrongful removal," and therefore cannot prevail on a petition to a foreign court for an order of return. Mr. Croll bears the burden of showing that the Hong Kong custody decree affirmatively granted him shared or partial custody in some normal sense of the word. That he cannot do on this record.

C. *Intent of the Drafters*

If the stated intent of those who drafted the Convention "suffice[s] to establish that the result the text produces is not necessarily absurd, and hence cannot be dismissed as

obvious drafting error," our inquiry is at an end. *Chan*, 490 U.S. at 134; *see also id.* at 135 n.5 ("Even if the text were less clear, its most natural meaning could properly be contradicted only by clear drafting history."). The Convention's ratification history is entirely consistent with our interpretation of "rights of custody" as defined in the Convention.

1. The chair of the Hague Conference Commission that drafted the Convention (while allowing that the issue is not altogether clear) has written that the sole power to bar exit does not amount to the custodial bundle of rights:

> [B]reach of a right simply to give or to withhold consent to changes in a child's place of residence is not to be construed as a breach of rights of custody in the sense of Article 3. A suggestion that the definition of "abduction" should be widened to cover this case was not pursued.

A. E. Anton, *The Hague Convention on International Child Abduction*, 30 Int'l & Comp. L.Q. 537, 546 (1981). It thus appears that suggestions to broaden the availability of the return remedy — to give an "access only" parent the right to compel return — were raised when the Convention was in draft, and were in turn rejected.

2. The official reporter of the Hague Conference recounts that "[a]lthough the problems which can arise from a breach of access rights, especially where the child is taken abroad by its custodian, were raised . . . the majority view was that such situations could not be put in the same category as the wrongful removals which [the Convention] is sought to prevent." Pérez-Vera Report ¶ 65, at 444-45.

3. In submitting the Convention to President Reagan, Secretary of State George P. Schultz reported that "[t]he remedies for breach of the 'access rights' of the non-custodial parent do not include the return remedy . . . ." Letter of Submittal of the Hague Convention on the Civil Aspects of International Child Abduction, by the Secretary of State to the President, Oct. 4, 1985, *in* 51 Fed. Reg. at 10,496; *see also* Letter of Transmittal from the White House to the Senate, Oct. 30, 1985, *in* 51 Fed. Reg. at 10,495 (discussing congressional finding that "[p]ersons should not be able to *obtain* custody of children by virtue of this wrongful removal or retention") (emphasis added). The Secretary's view of the matter is entitled to "great weight." *Sumitomo Shoji America*, 457 U.S. at 184-85. *See generally El Al Israel Airlines v. Tsui Yuan Tseng*, 525 U.S. 155, 168 (1999) ("Respect is ordinarily due the reasonable views of the Executive Branch concerning the meaning of an international treaty." (citing *Sumitomo Shoji America*, 457 U.S. at 184-85)).

4. The Convention's official reporter has explained why the Convention provides separate remedies to secure access rights versus custodial rights, and limits the return remedy to the breach of custody:

> A questionable result would [be] attained had the application of the Convention, by granting the same degree of protection to custody and access rights, led ultimately to the *substitution* of the holders of one type of right by those who held the other.

Pérez-Vera Report ¶ 65, at 445 (emphasis added).

* * *

Appendix A

Mr. Croll asks us to draw a distinction between: (i) a bare right of access, recognized as such; and (ii) the same bare right of access enforced by a *ne exeat* clause. The rationale for this distinction is that a parent who removes a child in violation of access rights *and* a *ne exeat* clause would otherwise succeed in frustrating the *ne exeat* clause altogether, so that a return remedy is needed to achieve the Convention's goal of preventing parents from unilaterally circumventing the home country's courts in search of a more sympathetic forum. But the frustration of judicial power is not the touchstone for a return remedy under the Convention. A court order that confers a right of access (without more) on a non-custodial parent of a middle-class means is utterly frustrated if a custodial parent then permanently moves the child so far away that neither parent can afford to finance court-ordered access. Yet it is undisputed that the remedy of return is unavailable in such a case.

A *ne exeat* provision protects parental rights of access or custody alike; it does not transmute one right into the other. Thus, to grant the remedy of return where the petitioning parent has no right but access (whether or not that right is aided by a *ne exeat* clause) would effect a "substitution" of rights, something that the Convention expressly forbids. *See* Pérez-Vera Report ¶ 65, at 445. Overlooking the stated intentions of the drafters and amending judicially the Convention's explicit textual distinction between rights of custody and rights of access "would be to make and not construe a treaty." *See Chan*, 490 U.S. at 135 (internal quotation marks omitted). That is something we cannot do. *See id.* ("[t]o alter, amend, or add to any treaty, by inserting any clause, whether small or great,

important or trivial would be on our part an usurpation of power, and not an exercise of judicial function." (quoting *The Amiable Isabella*, 19 U.S. (6 Wheat) 1, 71 (1821)) (alteration in original; internal quotation marks omitted)).

D. *Foreign Caselaw*

No consensus view emerges from the opinions issued by the courts of the signatory nations. Though the "opinions of our sister signatories [are] entitled to considerable weight," *Air France v. Saks*, 470 U.S. 392, 404 (1985), we are aware of no doctrine requiring our deference to a series of conflicting cases from foreign signatories.

Foreign courts are split on the issue presented in this case. *Compare In re Resina*, (1991) Appeal No. 52 (Austl. Fam.) (violations of court orders generally trigger return); C.A. 5271/92, *Foxman v. Foxman* (Isrl. H.C. 1992) (finding that both parents hold "rights of custody" where neither parent can remove the child without the other's consent or without consulting a rabbi), *with D.S. v. V.W.* [1996] 134 D.L.R.4th 481, 501-04 (Can.) (finding no jurisdiction to order return though removal was in violation of an implicit provision in the custody decree); *Thompson v. Thompson* [1994] 119 D.L.R.4th 253 (Can.) (noting that a *ne exeat* clause in a permanent custody order was intended to ensure access and "was not intended to be given the same level of protection by the Convention as custody"); *Ministere Public v. Mme Y*, T.G.I. Periguez, Mar. 17, 1992, D.S. Jur. 1992 (Fr.) (holding violation of a *ne exeat* provision to be "secondary" and not a violation of custody rights). Moreover, most of the cases rest on distinguishable facts, such as (a) orders of *temporary* custody awarded in the course of an

ongoing custody battle, *see B v. B*, [1992] 3 W.L.R. 865, [1993] Fam. 32 (U.K. Ct. App. 1992) (return available where no custody order is in place and temporary custody is expressly conditioned on non-removal of the child pending further proceedings), or (b) consent decrees expressly granting custody rights to both parents, *see C v. C*, [1989] 1 W.L.R. 654 (U.K. App. Ct. 1988) (consent order granting "joint guardianship" to both parents).

Although the dissent claims "strong support" in caselaw for its point of view, *see post* at 6265, the dissent itself confirms that no consensus is available: the cases worldwide are few, scattered, conflicting, and sometimes conclusory and unreasoned.[6] One further problem with the cases relied on by the dissent (and a problem with the dissent itself) is that in effect the rights of access are vindicated by the same remedy (compulsory return) as rights of custody; and while that seems to be a good idea as a matter of child development, it is incompatible with the terms of the Convention.

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6. The lack of uniform interpretation (or application) of the Convention can be illustrated another way. The rate of return for children wrongfully removed *to* the United States from other countries is approximately 90 percent. *See* Mary A. Ryan, Assistant Sec. for Consular Affairs, U.S. Dep't of State, Prepared Statement Before the House Committee on International Relations (Oct. 14, 1999) *available in* 1999 WL 909860 (F.D.C.H.) at 3. The rate of return for American children wrongfully removed *from* the United States to a foreign country, however, is less than 30 percent. *See* Thomas A. Johnson, Prepared Statement Before the House Committee on International relations (Oct. 14, 1999) *available in* 1999 WL 909869 (F.D.H.C.) at 30. *See, e.g.*, Concurrent Resolution urging compliance with the Hague Convention on the Civil Aspects of International Child Abduction, S. Con. Res. 293, 106th Cong., 146 Cong. Rec. H5089-07 (2000) (enacted).

Appendix A

CONCLUSION

For the reasons stated we hold that a *ne exeat* clause does not transmute access rights into rights of custody under the Convention. *Ne exeat* or not, Mr. Croll's rights include none of the powers (or burdens) of a custodial parent, and therefore are properly classified as rights of access. The Convention affords him several remedies for trespass on those rights, but return of the child to Hong Kong is not one of them. The district court's order returning Christina to Hong Kong is accordingly reversed and the case is remanded for dismissal of the petition for an order of return.

Appendix A

SOTOMAYOR, *Circuit Judge*, dissenting:

The central issue in this case is whether the *ne exeat* provision in the Hong Kong custody order confers on either Mr. Croll or the Hong Kong court "rights of custody" within the meaning of the Hague Convention on the Civil Aspects of International Child Abduction ("Hague Convention" or "Convention"). The majority concludes that it does not and, therefore, that the district court lacked jurisdiction to order Christina's removal to Hong Kong. Interpreting the text of the Convention in light of its object and purpose, and taking into account the relevant case law in this area, I reach the opposite conclusion. In my view, the majority seriously misconceives the legal import of the *ne exeat* clause and, in so doing, undermines the Convention's goal of "ensur[ing] that rights of custody . . . under the law of one Contracting State are effectively respected in the other Contracting States." Hague Convention, art. 1, *done* Oct. 25, 1980, T.I.A.S. No. 11670 at 4, 1343 U.N.T.S. 89, 98, *reprinted in* 51 Fed. Reg. 10,494, 10,498 (1986), *implemented by* the International Child Abduction Remedies Act ("ICARA"), 42 U.S.C. § 11601 *et seq.* I therefore respectfully dissent.

The Hague Convention seeks "to protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence, as well as to secure protection for rights of access." Hague Convention, Preamble, 51 Fed. Reg. at 10,498. Significantly, the Convention draws a clear line between "rights of custody" and "rights of access," reserving the remedy of return solely for breaches of the former. *Compare* Hague Convention,

arts. 1, 3, *id.* (providing for the return of children removed or retained in violation of custody rights), *with* Hague Convention, art. 21, *id.* at 10,500 (providing that a party may petition for arrangements, short of the child's return, to secure the effective exercise of access rights). In this regard, the majority correctly observes that "an order of return is available *only* for wrongful removals or retentions, and removals or retentions are wrongful *only* if they are 'in breach of rights of custody.' " *Ante* at 6237 (quoting Hague Convention, art. 3, 51 Fed. Reg. at 10,498) (emphasis in original).

Article 3 of the Convention provides that the removal or retention of a child is "wrongful" where:

> (a) it is in *breach of rights of custody* attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and
>
> (b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or *would have been so exercised but for the removal or retention.*

Hague Convention, art. 3, 51 Fed. Reg. at 10,498 (emphasis added). Thus, Mr. Croll cannot succeed in securing Christina's return to Hong Kong unless he can demonstrate that her removal was "in breach of rights of custody" and, furthermore, that at the time of Christina's removal from Hong Kong, those rights of custody "were actually exercised,

either jointly or alone, or would have been so exercised but for the removal." Hague Convention, art 3, *id.* For the reasons discussed below, I conclude that Christina's removal to the United States was "wrongful" under the Convention because (1) it constituted a "breach of rights of custody" jointly held by Mr. Croll and the Hong Kong court, and (2) Mr. Croll would have exercised his custody rights under the *ne exeat* clause in the custody order but for Christina's removal from Hong Kong.

I. Was Christina Removed from Hong Kong "in Breach of Rights of Custody"?

Under the terms of the Hong Kong custody order, Ms. Croll is vested with "[t]he custody, care and control" of Christina,[1] and Mr. Croll is vested with rights of "reasonable access." Particularly relevant to this case, however, is the order's further grant of rights to Mr. Croll under the *ne exeat* clause. The parties agree that under this provision, Ms. Croll may not remove Christina from Hong Kong without the consent of either Mr. Croll or the Hong Kong court.[2] In other

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1. The majority states that the custody order "confers the *sole* 'custody, care and control' " upon Ms. Croll. *Ante* at 6230 (emphasis added); *see also id.* at 6241 (stating that "the custody order awards between custody and care and control *solely* to the mother"). However, nowhere does the Hong Kong court use the word "sole" or "solely" in connection with Ms. Croll's custody rights.

2. The Hong Kong custody order also provides that "[e]ither parent may request the Immigration Department not to issue passports allowing the said child to go abroad without his/her knowledge."

words, the *ne exeat* clause confers a veto power on Mr. Croll to block Christina's international relocation, unless the Hong Kong court explicitly approves such removal. In essence, the *ne exeat* clause endows Mr. Croll with significant decisionmaking power: absent an order of the Hong Kong court to the contrary, he can require that Christina remain in Hong Kong or, alternatively, he can use his veto power as leverage to influence Ms. Croll's selection of the destination country. Because Mr. Croll may not invoke the Convention's return remedy based on his "reasonable access" rights, the issue in this case is whether he may secure Christina's return under the Convention by virtue of his rights under the *ne exeat* clause.

The majority mischaracterizes the issue as being a question of whether the *ne exeat* clause "transmute[s] access rights into rights of custody under the Convention." *Ante* at 6249. Clearly, the *ne exeat* clause works no such magic. In my view, the question presented is whether the *ne exeat* clause — wholly independent of Mr. Croll's access rights — confers "rights of custody" under the Convention. The Convention's text, object and purpose, as well as the relevant case law in this area, convincingly direct an answer in the affirmative.

A. *The Text, Object, and Purpose of the Convention*

The critical interpretive challenge in this case involves the definition of "rights of custody" as used in the Convention. The majority begins this undertaking by surveying a host of American dictionaries to support its "intuition that custody is something other and more than a

negative right or veto." *Ante* at 6238. Relying on these sources, the majority finds that the "custody of a child entails the primary duty and ability to choose and give sustenance, shelter, clothing, moral and spiritual guidance, medical attention, education, etc., or the (revocable) selection of other people or institutions to give these things." *Ante* at 6239. While traditional American notions of custody rights are certainly relevant to our interpretation of the Convention, the construction of an international treaty also requires that we look beyond parochial definitions to the broader meaning of the Convention, and assess the "ordinary meaning to be given to the terms of the treaty in their context and in the light of [the Convention's] object and purpose." Vienna Convention on the Law of Treaties, May 23, 1969, art. 31.1, 1155 U.N.T.S. 331, 340 (stating general rule on the interpretation of treaties); *see also* Restatement (Third) of Foreign Relations Law § 325 (1987) (same).

Contrary to the majority's position that "[n]othing in the Hague Convention suggests that the drafters intended anything other than this ordinary understanding of custody," *ante* at 6239, the Convention and its official history reflect a notably more expansive conception of custody rights. The report containing the official history and commentary on the Convention clarifies that "the intention [of the Convention] is to protect *all* the ways in which custody of children can be exercised." Elisa Pérez-Vera, Explanatory Report to the Hague Conference on Private International Law, *in* 3 Acts and Documents of the Fourteenth Session (Child Abduction) 426, para. 71 (1980) (emphasis in original) ("Pérez-Vera Report"). This broad notion of custody rights is also consistent with Article 3, which provides that "rights of

custody" may arise from a variety of sources, including by "operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of [the child's country of habitual residence]." Hague Convention, art. 3, 51 Fed. Reg. at 10,498. In this way, the Convention plainly favors "a flexible interpretation of the terms used, which allows the greatest possible number of cases to be brought into consideration." Pérez-Vera Report, para. 67. Consequently, in determining whether the rights arising under a *ne exeat* clause constitute "rights of custody" under the Convention, I discern an intent of inclusion rather than exclusion, so as to effectuate the drafters' goal of making the treaty applicable to all possible cases of wrongful removal.

Although the treaty does not generally define its legal terms, *see* Pérez-Vera Report, para. 83, the risk that "an incorrect interpretation of [custody and access rights] would . . . compromis[e] the Convention's objects" led the drafters to include Article 5, which offers further guidance on the meaning of the term "rights of custody." *See* Pérez-Vera Report, para. 83. I note, however, that the provision was left deliberately vague due to the drafters' failure to agree on a more precise definition. *See* Pérez-Vera Report, para. 84 ("[S]ince all efforts to define custody rights in regard to [particular situations] failed, one has to rest content with the general description given [in the text]."). Article 5 provides that:

> For the purposes of this Convention —
>
> > (a) "rights of custody" shall include rights relating to the care of the person

> of the child *and, in particular, the right to determine the child's place of residence*; . . .

Hague Convention, art. 5, 51 Fed. Reg. 10,498 (emphasis added); *see also* Pérez-Vera Report, para. 84 (noting that under Article 5, "rights of custody" include those rights relating to the care of the child, and that the Convention seeks to clarify this otherwise general definition "by emphasizing, as an example of the 'care' referred to, the right to determine the child's place of residence."). As I interpret the Convention, rights arising under a *ne exeat* clause include the "right to determine the child's place of residence" because the clause provides a parent with decisionmaking authority regarding a child's international relocation. Thus the *ne exeat* clause vests both Mr. Croll and the Hong Kong court with "rights of custody" for the purposes of the Convention. *See* Hague Convention, art. 5, 51 Fed. Reg. at 10,498.

A parent's *ne exeat* rights fit comfortably within the category of custody rights the Convention seeks to protect. The Convention states at its outset that its object is, along with returning children wrongfully removed from their habitual residence, "to ensure that rights of custody . . . under the law of one Contracting State are effectively respected in the other Contracting States." Hague Convention, art. 1, 51 Fed. Reg. at 10,498. The Pérez-Vera report explains that

> the problem with which the Convention deals . . . derives all of its legal importance from the possibility of individuals establishing legal and jurisdictional links [in the new country] which are

> more or less artificial. In fact, resorting to this expedient, an individual can change the applicable law and obtain a judicial decision favorable to him. [Such a decision] bears a legal title sufficient to "legalize" a factual situation which none of the legal systems involved wished to see brought about.

Pérez-Vera Report, para. 15. At its core, therefore, the Convention's return remedy targets those individuals who cross international borders, presumably in search of a friendlier forum, flouting the custody law of the child's home country in the process. *See Blondin v. Dubois*, 189 F.3d 240, 245-46 (2d Cir. 1999) (describing the Convention's purpose as " 'preserv[ing] the status quo and . . . deter[ring] parents from crossing international boundaries in search of a more sympathetic court.' ") (quoting *Friedrich v. Friedrich*, 983 F.2d 1396, 1400 (6th Cir. 1993)).

In light of the Convention's broad purpose, the concept of "wrongful removal" clearly must encompass violations of *ne exeat* rights. When a parent takes a child abroad in violation of *ne exeat* rights granted to the other parent by an order from the country of habitual residence, she nullifies that country's custody law as effectively as does the parent who kidnaps a child in violation of the rights of the parent with physical custody of that child. Moreover, where, as here, the parent seeks a custody order in the new country, she seeks to legitimize the very action — removal of the child — that the home country, through its custody order, sought to prevent. To read the Convention so narrowly as to exclude the return remedy in such a situation would allow such parents to undermine the very purpose of the Convention.

Appendix A

B. *The Majority's Approach*

In reaching the opposite conclusion, the majority contends that "rights of custody," as used in the Convention, refers to a "bundle of rights" of which a parent must possess a certain portion in order to be protected by the Convention, and that possession of only one of those rights — in this case, the "right to determine the child's place of residence" by exercising and leveraging a veto power over the child's international relocation — is insufficient to confer custody on the party possessing that power. *See ante* at 6239-40. In my view, however, the Convention's definition of "rights of custody" contemplates a bundle of rights that are protected regardless of whether a parent holds one, several or all such custody rights, and whether the right or rights are held singly or jointly with the other parent. In fact, the Convention expressly protects joint custody rights, *see* Hague Convention, art. 3, 51 Fed. Reg. at 10,498, which may assume a number of forms, including situations in which one parent possesses sole physical custody of the child but shares certain decisionmaking authority with the other parent. The Convention contains no indication that in such an arrangement, a parent must possess some minimum number of rights of custody in order to qualify for protection.

The majority also maintains that a parent's *ne exeat* right does not equate with Article 5's "right to determine the child's place of residence" because the latter right necessarily entails "specific choices" regarding the child's living situation rather than simply decisions regarding the country in which she lives. *See ante* at 6240-41. Like the majority's definition of "custody," however, this conclusion ignores the

basic international character of the Hague Convention. While such "specific choices" certainly constitute facets of custody, the broader decision as to whether a child will live in England or Cuba, Hong Kong or the United States, is precisely the kind of choice the Convention is designed to protect. *See* Pérez-Vera Report, para. 56 ("Although the Convention does not contain any provision which expressly states the international nature of the situations envisaged, such a conclusion derives as much from its title as from its various articles. . . . [T]he international nature of the Convention arises out of a factual situation, that is to say the dispersal of members of a family among different countries."). The Hague Convention provides a remedy not when a parent moves the child from city to suburb or from home to boarding school, but when he or she transports the child across national borders. In light of this international context, the term "place of residence," as used in the Convention, logically contemplates decisions regarding international relocation. Accordingly, the right to choose the country in which a child lives, like the authority over the child's more specific living arrangements, constitutes a "right to determine the child's place of residence" under Article 5, and thus a "right of custody" under the Convention.[3]

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3. To be sure, the right to prevent a child's removal from her home country does not constitute an absolute right "to determine the child's place of residence." That a right is limited, however, does not render it meaningless for purposes of the Hague Convention. *See* Pérez-Vera Report, para. 71 (characterizing "joint custody" as "dividing the responsibilities inherent in custody rights between both parents"). Furthermore, that a right is a veto or "negative right" does not diminish its status as a right. *See, e.g.*, *Cruzan v. Director, Missouri Dep't of Health*, 497 U.S. 261, 281 (1990) (recognizing the due process right to *refuse* life-sustaining medical treatment).

The majority avoids this conclusion by asserting that the power to determine a child's country of residence "protects rights of custody and access alike, and [gives] no clue as to who has custody." *Ante* at 6240. But while such a power may have the effect of ensuring a parent's reasonable access, and in fact may be included in a custody order for precisely that purpose, *ne exeat* rights circumscribe the choices of the parent with physical custody of the child in a way that "reasonable access" rights do not. Absent a *ne exeat* clause, the international relocation of a child does not necessarily violate the other parent's access rights; the parents still may work out an arrangement that satisfies the rights of "reasonable access" even across international borders. On the other hand, when a parent expatriates her child without securing the necessary consent, she has, by definition, violated the other parent's *ne exeat* rights.

The majority also posits that the Convention would be "unworkable" if it provided the return remedy for violations of a parent's *ne exeat* rights. *See ante* at 6242-43. Because an order of return can require only Christina, and not Ms. Croll, to return to Hong Kong, the majority claims that "we cannot plausibly read the Convention to compel the removal of a child from a parent who exercises all rights of care to a country in which no one has that affirmative power or duty." *Ante* at 6243. The majority mistakenly assumes that the custody order in a given case is the sole source of a parent's rights *and duties* vis-à-vis his or her child. To the contrary, a parent's duty to care for a child, like his or her rights of custody, may arise from many sources, including the law of the country of habitual residence. That the custody order in this case granted "custody, care and control" of Christina to

Ms. Croll, therefore, does not direct the conclusion that Mr. Croll will have no responsibility to care for Christina upon her return to Hong Kong.[4] I therefore reject the majority's

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4. The majority faults the dissent for its "assumption" that a court will "alter custody rights" upon the child's return, and raises fears that absent such alteration, the child will be uncared for upon her return to Hong Kong. *See ante* at 6244. Christina's care upon her return is neither premised on assumptions nor relevant to the issue before us. First, it strains credulity to suggest that a father who, as here, searches the world for his child to get her back and files a petition in a foreign forum in order to do so, would, upon succeeding in his efforts, simply permit his child to stand abandoned in the airport upon her return. The majority confuses physical care of a child with legally-ordered custody. Furthermore, if Christina's care upon her return to Hong Kong were really a concern in the instant case, the appropriate remedy would not be reversal but a remand to the district court to assess the parties' intentions. *See Feder v. Evans-Feder*, 63 F.3d 217, 226 (3d Cir. 1995) ("[I]n order to ameliorate any short-term harm to the child, courts in the appropriate circumstances have made return contingent upon 'undertakings' from the petitioning parent."); *In re Walsh*, 31 F. Supp. 2d 200, 207 (D. Mass. 1998) ("Numerous courts granting petitions under the Convention have recognized the legitimacy of exacting appropriate undertakings from the parents designed to ensure that the children will be cared for properly during transit and that no harm will come to the children pending disposition in the country of habitual residence.") (citations omitted), *aff'd in part, rev'd in part on other grounds sub nom. Walsh v. Walsh*, __ F.3d __ 2000 WL 1015863 (1st Cir. July 25 2000). Second, the issues concerning Christina's custody upon her return are beyond the scope of the Convention, which deals solely with returning a child to the country of habitual residence so that its courts, and not a foreign court in the country to which the child has been wrongfully removed, can adjudicate custody rights with respect to that child. This concept underlying

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dire forecast that ordering Christina's return, without Ms. Croll at her side, risks leaving Christina helpless in Hong Kong without parental care.

Moreover, the majority's characterization of a return remedy for violations of *ne exeat* rights as unworkable fails to account for the Convention's protection of any number of joint custody arrangements in which the parents trade physical custody or in which one parent possesses physical custody and the other parent contributes to decisions about the child's upbringing. By the majority's reasoning, were the parent with physical custody to remove the child from the country of habitual residence, the court would have no power to return the child, because no adult would be required to care for him or her upon return. Such a conclusion, however, would largely eviscerate the Convention's protection of joint custody rights.

Far from being unworkable, the application of the return remedy in the context of *ne exeat* violations directly and fully advances the Convention's goal of preventing parents from unilaterally circumventing the home country's custody law. In contrast to access right violation cases where returning the child to her country of habitual residence would not itself

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the Convention — that the child is best served by entrusting decisions regarding his or her custody to the courts of the child's country of habitual residence — stands in direct contradiction to the majority's parochial view that foreign courts cannot be trusted in the same manner as American courts to competently make necessary decisions regarding the child. *See ante* at 6244 ("on this point the dissent is generalizing from local American law").

guarantee the effective exercise of such rights, ordering the return of a child based on a *ne exeat* violation will, in and of itself, give full effect to a parent's *ne exeat* rights.

Finally, the majority cites to a string of authorities under the caption "Intent of the Drafters" to support its narrow reading of the Convention. *See ante* at 6245-47. With one exception, these authorities stand only for the unremarkable proposition that under the Convention, the return remedy is unavailable for breaches of parents' access rights.[5] In sum,

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5. The majority quotes A.E. Anton, the former chairman of the Hague Conference Commission, who opines that "breach of a right simply to give or to withhold consent to changes in a child's place of residence is not to be construed as a breach of rights of custody in the sense of Article 3." *Ante* at 6245 (quoting A.E. Anton, *The Hague Convention on International Child Abduction*, 30 Int'l & Comp. L.Q. 537, 546 (1981)). Although Mr. Anton's views support the majority's interpretation of the Convention, the majority neglects to emphasize that his article represents only his personal views and not the official legislative history of the Convention. *See* Anton, *supra* at 537 ("This paper, however, must not be taken to reflect any views other than those of the author."). His article is therefore appropriately viewed as simply the opinion of one scholar. Other scholars, in contrast, have concluded that *ne exeat* rights do constitute "rights of custody" under the Convention. *See, e.g.*, Paul R. Beaumont & Peter E. McEleavy, *The Hague Convention on International Child Abduction* 72-73 (1999) ("If an individual is a child's sole custodian there are, prima facie, no restrictions on him relocating with that child. If there *are* such restrictions, that implies that the custody right must in some way be limited. Where this is so it must be that another body or individual holds a corresponding right in relation to the child. Therefore, should the primary carer remove the child abroad, . . . he would have breached the custody

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those authorities shed no light on the issue relevant here, *i.e.*, whether *ne exeat* rights constitute "rights of custody" for the purposes of the Convention.

C. *International Case Law*

While not essential to my conclusion that *ne exeat* rights constitute "rights of custody" under the Convention, I note that my analysis is consistent with the decisions of most foreign courts to consider the issue. *See generally Air France v. Saks*, 470 U.S. 392, 404 (1985) (in construing the terms of a treaty, "the opinions of our sister signatories [are] entitled to considerable weight.") (quoting *Benjamins v. British European Airways*, 572 F.2d 913, 919 (2d Cir. 1978)). Given the desirability of uniformity in treaty interpretation, *see Denby v. Seaboard World Airlines, Inc.*, 737 F.2d 172, 176 n.5 (2d Cir. 1984), these cases lend support to my understanding of the Convention.

Most foreign courts addressing this question have interpreted the notion of "rights of custody" broadly in light of the Convention's purpose and structure. The Family Court

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rights of the other party, if their consent had not been sought.") (emphasis in original); Linda Silberman, "Custody Orders Under the Hague Abduction Convention," *in A New Vision for a Non-Violent World: Justice for Each Child* (Proceedings of the 4th Biennial International Conference of the International Association of Women Judges, 1999), at 236 (arguing that in cases of non-removal order violations, "a failure to recognize the Convention remedy of return would be inconsistent with the careful compromise [between custody and access rights] that the Convention definition [of custody rights] has put in place.").

of Australia, for example, has characterized the "spirit of the Convention" as ensuring "that children who are taken from one country to another wrongfully, in the sense of in breach of court orders or understood legal rights, are promptly returned to their country so that their future can properly be determined within that society." *In the Marriage of: Jose Garcia Resina Appellant/Husband and Muriel Ghislaine Henriette Resina Respondent/Wife*, Appeal No. 52, 1991 (Fam.) (Austl.), para. 26. Accordingly, the court held that the custody order at issue — which provided reciprocal *ne exeat* rights for each parent — created "rights of custody" in the otherwise non-custodial father.

The English Court of Appeal has employed a similarly broad reading of the Convention, holding that Article 5 "may in certain circumstances extend the concept of custody beyond the ordinarily understood domestic approach" so as to ensure "that within its scope [the Convention] is to be effective." *C. v. C.*, [1989] 1 W.L.R. 654, 658 (C.A.) (Eng.). In *C. v. C.*, the court ordered the return of a child where an Australian order granted custody to the child's mother, but also provided that the father and mother would remain "joint guardians" and that neither parent could remove the child from Australia without the consent of the other. *See id.* at 656. Interpreting the language of Article 5, the court found that because the Australian custody order allowed the father to exercise a measure of control over the child's place of residence, the father possessed "custody rights" within the meaning of the Convention:[6]

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6. The majority attempts to distinguish *C. v. C.* as involving an order of joint guardianship, *see ante* at 6248, but the *C. v. C.* (Cont'd)

> [T]he father had, in my judgment, the right to determine that the child should reside in Australia or outside the jurisdiction at the request of the mother. . . . [He has] some control over not only the child leaving the jurisdiction, but also as a place to which the child was going, and not only the country; for instance, to live in London under suitable circumstances. . . . The father does not have the right to determine the child's place of residence within Australia but has the right to ensure that the child remains in Australia or lives anywhere outside Australia only with his approval.

Id. at 658. The Israeli High Court of Justice, when presented with facts nearly identical to those in the instant case, similarly interpreted "rights of custody" to encompass a parent's rights under a non-removal order. *See* C.A. 5271/92, *Foxman v. Foxman* (H.C. 1992) (Isr.) (finding that the Convention's definition of "custodial rights" should be "broadly construed," so as to cover cases in which parental consent is required before a child is taken out of the country); *cf.* C.A. 1648/92, *Tourna v. Meshulem* (H.C. 1992) (Isr.)

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court explicitly relied on the language of the *ne exeat* provision and not the joint guardianship clause in determining that the father possessed "rights of custody" under the Convention. *See* [1989] 1 W.L.R. at 657-58 ("[The lower court judge] heard argument as to the effect of . . . joint guardianship. . . . [Accordingly, t]he judge's attention does not appear to have been sufficiently drawn to the effect on the definition in article 5 of the Convention of clause 2 of the November 1986 order, that neither parent should remove the child from Australia without the consent of the other.").

(finding "rights of custody" in a father who, by virtue of a joint custody order, had authority to refuse consent to the child's change in residence).

In addition to these cases, which address custody rights held by a *parent* with *ne exeat* rights, the English Court of Appeal has also held that a *court* entering the custody order in the child's place of habitual residence may itself possess "rights of custody" under the Convention in certain circumstances. *See B. v. B.*, [1993] 2 All E.R. 144 (C.A.) (Eng.). The court in *B. v. B.* noted that under Article 3 an "institution or other body" as well as an individual may hold custody rights and thus concluded that the removal of the child by the parent with physical custody in breach of an interim custody order conditioned on the child remaining within the jurisdiction violated the rights of both the other parent and the court issuing the interim custody decree. *See id.* at 148-49. Echoing the reasoning of *C v. C*, the court found that because the restriction required the parent with physical custody to remain in the court's jurisdiction, and thus impliedly gave the court and the parent without physical custody the right to veto an international move, it vested both with the power to determine the child's residence. *See id.* at 148-49. The court therefore affirmed the order of return on the ground that the child's removal had been wrongful within the meaning of the Convention. *See id.* at 153.[7]

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7. It is not apparent to me how the majority turns this case — involving a veto power over international relocation possessed by a court and a parent — into a decision that requires return of the child "whenever a court enters a custody order" that is violated, regardless of the terms of that order. *See ante* at 6241. This dissent has never

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Appendix A

These cases reflect strong support among our sister signatories for the proposition that "rights of custody" are implicated where a custody order vests either a parent or the court with the power to block a parent with physical custody from deciding to expatriate her child.[8] While there are several cases in other jurisdictions that are certainly in tension with this view, I find the reasoning in those cases unpersuasive.

At least one French court has determined that a custody order requiring the mother to raise her children in England and Wales did not create custodial rights in the father because such a reading would infringe on the mother's right to expatriate. *See* T.G.I. Periguex, Mar. 17, 1992, *Ministere Public v. Mme. Y.*, D.S. Jur. 1992 (Fr.). However, the court in *Mme. Y.* did not address the meaning of Article 5's "right

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suggested that Mr. Croll or the court would be entitled to an order of return if they did not possess *ne exeat* rights, nor does *B v. B* or this dissent suggest that return would be required in the scenario posed by the majority of "expatriation in derogation solely of parental rights of access." *See ante* at 6241.

8. Although the majority states that "we and the district court are the only courts in the United States," *ante* at 6235, to consider the issue before us, I note that two American courts have also recognized "rights of custody" in connection with custody orders containing a *ne exeat* clause. *See David S. v. Zamira S.*, 151 Misc.2d 630, 574 N.Y.S.2d 429 (N.Y. Fam. Ct. 1991); *Janakakis-Kostun v. Janakakis*, 6 S.W.3d 843 (Ky. Ct. App. 1999), *review denied* (Dec. 9, 1999), *petition for cert. filed*, 68 U.S.L.W. 3595 (U.S. Mar. 8, 2000) (No. 99-1496). In my view, however, these cases are of limited utility because they fail precisely to define "custodial rights" or to differentiate them from access rights.

to determine the child's place of residence" provision and instead focused on the mother's expatriation rights under the European Convention for the Protection of Human Rights and Fundamental Freedoms. *See id.* at 315-16. But deciding a Hague Convention case on the ground that the custodial parent must remain free to expatriate her child begs the crucial interpretive question of who, for purposes of the Convention, are "custodial parents" in the first place. Nothing in the Convention suggests that one parent's right to expatriate overrides another parent's rights of custody. On the contrary, the paramount importance the Convention places on custodial rights suggests that where custodial rights and expatriation rights conflict, the latter must yield to the former. To adopt another reading would, among other difficulties, make the Convention's protection of joint custody impossible, as joint custody by its very nature limits each parent's unilateral decisionmaking power, including his or her power to relocate to another country with the child. In my view, therefore, the legal presumption against restrictions on expatriation answers little.[9]

Apart from the *Mme. Y.* decision, two other cases are in tension with the proposition that *ne exeat* rights constitute "rights of custody" under the Convention. In two separate decisions, the Canadian Supreme Court has suggested — in *dicta* — that the Convention's "wrongful removal" provision does not cover cases in which a parent acts in violation of an express provision in a custody order granting

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9. I also note that courts in France appear divided on this issue. *See* Martha Bailey, *"Rights of Custody" Under the Hague Convention*, 11 B.Y.U. J. Pub. L. 33, 40 (1997) (discussing French cases).

ne exeat rights. In the first, *Thomson v. Thomson*, [1994] 119 D.L.R. 4th 253 (Can.), the court ordered a child's return based on an interim non-removal order in order to "preserve jurisdiction in the Scottish court to decide the issue of custody on its merits in a full hearing at a later date," but noted in *dicta* that such a remedy would be unavailable for violation of a *final* non-removal order because the purpose of such an order was simply to "ensure permanent access to the non-custodial parent." *Id.* at 281. In the second case, *D.S. v. V.W.* [1996] 134 D.L.R. 4th 481 (Can.), the court held that a return remedy was not available under the Convention for violation of an implicit removal restriction in a custody order, and — relying in part on the *dicta* in *Thomson* relating to express provisions in permanent custody orders — stated that a violation of such an implicit restriction would concern only access rights, not custodial rights. *Id.* at 501-06. However, the court nevertheless ultimately upheld the lower court's order of return on the alternate ground that such return was in the best interests of the child under Quebec domestic legislation. *Id.* at 516-17.

For the reasons explained above, *supra* I.A., I am unpersuaded by the argument that *ne exeat* clauses in permanent non-removal orders relate solely to access rights, the view endorsed by the Canadian Supreme Court. Nor do I consider significant the Canadian Supreme Court's emphasis on the distinction between interim and permanent custody orders. To be sure, a court issuing an interim custody order has a strong interest in preventing a child's removal before it has the opportunity to make its final custody determination. But nothing in the Convention's language or official history supports the notion that this interest is any

more important than the court's interest in enforcing the final custody order once issued. The dichotomy between an interim and permanent custody order is, therefore, for the purposes of the Convention, a distinction without a difference.

I note also that while the *D.S.* decision to uphold the order of return was unanimous, six (out of nine) justices expressed reservations regarding the opinion's analysis of custodial rights and obligations, *see* 134 D.L.R. 4th at 484, 518; *see also* Bailey, *supra*, at 49, thereby raising serious doubts as to whether the opinion's conception of *ne exeat* clauses in relation to the Convention truly represents the rule in Canada. Scholars have also strongly criticized the Canadian interpretation of custody rights under the Convention. *See, e.g.*, Bailey, *supra*, at 42-50; Linda Silberman, "Custody Orders Under the Hague Abduction Convention," *in A New Vision for a Non-Violent World: Justice for Each Child* (Proceedings of the 4th Biennial International Conference of the International Association of Women Judges, 1999), at 235-240. Therefore, following what I consider to be the more compelling reasoning of the English, Australian, and Israeli cases, I would join the courts of those countries in finding that rights arising under a *ne exeat* clause constitute "rights of custody" for the purposes of the Hague Convention.

II. Did Mr. Croll Or The Hong Kong Court "Actually Exercise" *Ne Exeat* Rights?

Apart from the central issue of whether *ne exeat* rights constitute "rights of custody" under the Convention, the

majority also holds that Mr. Croll's petition fails to satisfy the requirement of Article 3(b) of the Convention, which provides:

> The removal or retention of a child is to be considered wrongful where . . . at the time of removal or retention those rights [of custody] were actually exercised, either jointly or alone, *or would have been so exercised but for the removal or retention.*

Hague Convention, art. 3(b), 51 Fed. Reg. at 10,498 (emphasis added). According to the majority, "[t]he right conferred by the *ne exeat* clause is not one that Mr. Croll 'actually exercised,' and it is circular to say that he would have exercised it *but for* Christina's removal, because the right itself concerns nothing but removal itself, and would never have been exercised had Mrs. Croll been content to stay in Hong Kong during Christina's minority." *Ante* at 6242 (emphasis in original).[10] This description mischaracterizes the right that a *ne exeat* clause creates.

The right given to Mr. Croll and the Hong Kong court by the *ne exeat* clause was the authority to withhold or grant consent to removing Christina from Hong Kong. Had they refused to grant Ms. Croll permission to take Christina to the United States, or even had they agreed to grant permission, they would have "actually exercised" the custody rights granted by the custody order. While I agree that neither

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10. Ms. Croll does not argue on appeal that Mr. Croll's petition was defective under Article 3(b) of the Convention. The majority reaches this issue *sua sponte*.

Mr. Croll nor the court did, in fact, "actually exercise" this right, it seems clear to me that Ms. Croll's conduct in removing Christina without the necessary consent was precisely what prevented them from doing so. Because Ms. Croll deprived Mr. Croll and the court of the opportunity to exercise their veto power by surreptitiously removing Christina from Hong Kong without first seeking consent, the *ne exeat* right is one that "would have been so exercised" but for Christina's unlawful removal. Article 3(b) therefore poses no barrier to finding that Christina's removal was wrongful under the Convention.

For the foregoing reasons, I conclude that Christina's removal from Hong Kong to the United States was "wrongful" under the Convention because her removal (1) constituted a "breach of rights of custody" jointly held by Mr. Croll and the Hong Kong court, and (2) Mr. Croll or the court — or both — would have exercised their veto rights under the *ne exeat* clause but for Christina's removal from Hong Kong. Accordingly, I would affirm the district court's decision to grant Mr. Croll's petition for an order of return.

APPENDIX B — OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DATED AND FILED OCTOBER 19, 1999

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

99 Civ. 3566 (SHS)

STEPHEN HALLADAY CROLL,

Petitioner,

– against –

MEI YEE CROLL,

Respondent.

OPINION & ORDER

SIDNEY H. STEIN, District Judge:

This action was brought pursuant to the Convention on the Civil Aspects of International Child Abduction entered into at The Hague in 1980, T.I.A.S. No. 11670, 1343 U.N.T.S. 89 ("Hague Convention" or "Convention") and implemented in the United States by the International Child Abduction Remedies Act (ICARA), 42 U.S.C. § 11601 et seq. Petitioner seeks an order directing his former wife to return their minor child to Hong Kong, her "habitual residence." Respondent has moved pursuant to Fed. R. Civ. P. 12(b) to dismiss the petition on the grounds that this Court

lacks subject matter jurisdiction and the petition fails to state a claim for relief. Pursuant to the mandate for expedition set forth in the Convention, *see* Art. 11, on June 30, 1999 and July 6, 1999, this Court heard argument and received evidence relating to petitioner's application and respondent's motion. For the reasons set forth below, this Court finds that it has jurisdiction over this matter and that an order of return is justified.

BACKGROUND

Stephen Halladay Croll and Mei Yee Croll were married in Hong Kong in 1982. (Tr. at 31).[1] In 1990, their daughter Christina was born in Hong Kong, where she lived with both parents until they separated in early 1998. (Tr. at 31-32, 46). Thereafter, Christina continued living with her mother in Hong Kong (Tr. at 109); her father, who also continued to live there, visited her regularly. (Tr. at 36). Mr. Croll testified that he saw Christina approximately two to three times each week and accompanied her to after-school activities. (Tr. at 36-37). Ms. Croll testified that Mr. Croll saw Christina approximately two times each month. (Tr. at 112).

Because all of her grandparents live in the United States, Christina has visited the United States on several occasions, usually for a few weeks during the summertime and during school holidays. (Tr. at 46-48, 66).

Sometime in 1998, Mr. Croll commenced a divorce action in the District Court of Hong Kong, Special

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1. References to "Tr." are to the transcript of the hearings held in this proceeding.

Administrative Region, Matrimonial Causes. (Tr. at 33). Ms. Croll did not take part in that proceeding, and the parties dispute whether Ms. Croll ever received legally sufficient notice of its pendency. (Tr. at 35-36). On February 23, 1999, the Hong Kong court issued an interim order granting Ms. Croll "custody, care and control" of Christina, and granting Mr. Croll "reasonable access" to Christina. *See* Pet. Exh. 2. The order also directs that Christina

> be not removed from Hong Kong without leave until she attains the age of 18 years but provided that if either parent to [sic] give a general undertaking to the Court to return the said child to Hong Kong when called upon to do so, and unless otherwise directed with the written consent of the other parent, that parent may remove the said child from Hong Kong for any period specified in such written consent.

In addition, the order permitted either parent to request that the immigration department of Hong Kong not issue a passport for Christina to go abroad without that parent's consent. The February 23, 1999 order provides that it is to become final in six weeks unless cause is shown otherwise. Ms. Croll claims not to have had any actual notice of that order prior to the commencement of this Hague Convention action. (Tr. at 113-14). On May 3, 1999, the Hong Kong court issued an order requiring Mr. Croll to pay U.S. $1,000 per month to Ms. Croll for child support.

Mr. Croll testified that after he returned to Hong Kong from a business trip on April 7, 1999, he went to pick up

Christina from her school, but was told by Christina's teacher that his daughter had not been in class for two days.[2] (Tr. at 37). Mr. Croll then went to Ms. Croll's apartment; not only did he find it empty of all furniture, but the housekeeper informed him that Christina and her mother had "left."[3] (Tr. at 37-38). Mr. Croll deduced from that statement that they had gone to the United States. (Tr. at 38). According to Mr. Croll, he called Ms. Croll's parents in New York several times in an attempt to locate Christina, but his calls went unanswered. (*Id.*). On April 22 Mr. Croll, on the advice of his attorney, filed a missing person report with the police in Hong Kong. (Tr. at 14-15, 40, 53). Shortly thereafter, he retained U.S. counsel and filed this application pursuant to the Hague Convention.

At the evidentiary hearing on the petition, Ms. Croll testified that she and Christina arrived in the United States on April 2, (Tr. at 63), and that Mr. Croll had previously consented to her relocating to the United States with Christina. (Tr. at 65, 115-16). Mr. Croll, however, denied having done so, although he concedes that he and his ex-wife did discuss this possibility before they separated. (Tr. at 36,

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2. Ms. Croll testified that Christina was not at school on April 7 because her school was in recess from April 1 through April 12. (Tr. at 64). Mr. Croll disputes that. (Tr. at 38). It is unnecessary for this Court to resolve this factual dispute.

3. Mr. Croll testified that, after leaving Christina's school, he went to Ms. Croll's apartment and discovered that the apartment had been emptied. (Tr. at 37-38). Ms. Croll testified that when she left for the U.S. with Christina, she brought only two suitcases and did not empty the apartment of its furniture. (Tr. at 111).

38, 48). According to Ms. Croll, she arrived in New York with the intention of having Christina interview at schools here and, if Christina were admitted, having her attend school for a few weeks for a "tryout period," and then return to Hong Kong for the summer, and arrive back in New York this coming fall. (Tr. at 63, 68-69). Ms. Croll testified that she and Christina had purchased return airplane tickets to Hong Kong for June 10, 1999. (Tr. at 69).

After arriving in New York, however, she discovered that her ex-husband had terminated the lease to the Hong Kong apartment where she had been living with Christina and had a warrant issued for her arrest upon her return to Hong Kong. As a result, she decided to remain in New York. (Tr. at 69-70, 85-87). On cross-examination, however, Ms. Croll did concede that "[i]n the back of [her] mind" she had the intention of permanently remaining in the U.S. when she arrived here on April 2. (Tr. at 127). Mr. Croll denies that he took steps to have any warrant issued for Ms. Croll's arrest. (Tr. at 42).

On April 8, 1999, Ms. Croll commenced at least one action seeking orders of protection, custody, and support in New York State court (Tr. at 88); those proceedings have been stayed pending the outcome of this action.

DISCUSSION

The Hague Convention was adopted by signatory nations "to protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their

habitual residence." Hague Convention, Preamble. On September 1, 1997, the Convention entered into force between the United States and Hong Kong. The Convention prohibits a court where a petition is brought from ruling on the merits of the underlying custody dispute. *See* 42 U.S.C. § 11601(b)(4); Convention Arts. 16, 19. Those matters are reserved for the courts of the child's habitual residence, which are presumptively best able to determine and assess what is in the child's best interest. *See Blondin v. Dubois*, No. 98-2834, 1999 WL 626653, at *6 (2d Cir. Aug. 17, 1999) (citing *Friedrich v. Friedrich*, 983 F.2d 1396, 1400 (6th Cir. 1993) (Friedrich I)).; *Ciotola v. Fiocca*, 684 N.E.2d 763, 769-70 (Ohio 1997). This Court's duty pursuant to the Convention is to determine whether Christina has been wrongfully removed from the country of her habitual residence within the meaning of the Convention and, if so, to order that Christina be returned to Hong Kong unless certain narrowly-defined exceptions are present. *See* Convention Arts. 12, 13; *Rydder v. Rydder*, 49 F.3d 369, 372 (8th Cir. 1995); *Friedrich I*, 983 F.2d at 1400.

I. *Wrongful Removal*

In a petition brought pursuant to the Hague Convention, the petitioner has the burden of establishing by a preponderance of the evidence that the minor child was "wrongfully removed or retained within the meaning of the Convention." 42 U.S.C. § 11603(e)(1)(A). A removal or retention is "wrongful" if "(a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and (b) at the time of removal or

retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention." Hague Convention Art. 3. Where a child has been wrongfully removed and proceedings have been commenced within one year from the date of the wrongful removal, the Court "shall order the return of the child forthwith." *Id.* at Art. 12.

There is no dispute that Christina's habitual residence is in Hong Kong; she has lived there continuously since her birth. *See, e.g.*, *Friedrich I*, 983 F.2d at 1402 (child's habitual residence was Germany where he resided exclusively until his contested removal). The Convention, however, only provides the remedy of return of the child when that child has been removed in violation of the non-consenting parent's right of custody, and does not provide this relief if the non-consenting parent had only a right of access, rather than a right of custody. *See, e.g.*, *Bromley v. Bromley*, 30 F. Supp. 2d 857, 860-61 (E.D. Pa. 1998); *Viragh v. Foldes*, 612 N.E.2d 241, 246-47 (Mass. 1993). A right of custody may exist by reason of (1) operation of law; (2) a judicial or administrative decision; or (3) an agreement having legal effect under the law of that State. Convention Art. 3. Whether a parent was exercising lawful custody rights over a child at the time of removal must be determined pursuant to the law of the child's habitual residence. *See* Convention Art. 3; *Friedrich I*, 983 F.2d at 1402.

In support of his claim that he has a right of custody within the meaning of the Convention, Mr. Croll relies on the interim order issued by the Hong Kong court on February 23 which provides that Christina may not be removed from

Hong Kong before her 18th birthday without either leave of court or the written consent of the other parent. Ms. Croll, on the other hand, contends that that order on its face simply provided Mr. Croll with a right of access to Christina, and not a right of custody and, therefore, the petition must be denied.

The right to determine a child's place of residence is tantamount to a "right of custody" within the meaning of the Convention. *See* Convention Art. 5. Although there is a dearth of federal case authority, several courts have held that a provision restricting a custodial parent's right to remove a child from a geographical area vests the non-custodial parent with a "right of custody" within the meaning of the Convention. *See, e.g.*, *Janakakis-Kostun v. Janakakis*, No. 98-0259, 1999 WL 153369, at *5 (Ky. Mar. 19, 1999) (temporary order granting custody to respondent and prohibiting removal of child from Greece gave petitioner a right of custody within the meaning of the Convention); *David S. v. Zamira S.*, 151 Misc.2d 630, 635, 574 N.Y.S.2d 429, 432 (Kings 1991) (relying in part on respondent's contemptuous conduct in removing children in violation of order prohibiting removal of the children from Ontario in deciding that petitioner had a right of custody within the meaning of the Convention); *B v. B.*, 3 W.L.R. 865 (U.K. Ct. App. 1993)[4] (granting order

4. Although decisions of a court in a foreign country have no precedential weight, such decisions are properly consulted when construing the terms and scope of an international convention. *See Air France v. Saks*, 470 U.S. 392, 404, 105 S. Ct. 1338, 1345, 84 L. Ed. 2d 289 (1985) (determining what constitutes an "accident" within the meaning of the Warsaw Convention) (citing *Benjamins v. British European Airways*, 572 F.2d 913, 919 (2d Cir. 1978)).

for return of child where court had a right of custody by virtue of an interim custody order prohibiting custodial parent from removing child from Ontario); *C v. C*, 1 W.L.R. 654 (U.K. Ct. App. 1989) (providing that "right to give or withhold consent to any removal of the child from Australia, coupled with the implicit right to impose conditions, is a right to determine the child's place of residence, and thus a right of custody within the meaning of arts 3 and 5 of the convention"); *Re H.*, 2 F.L.R. 439 (U.K. Fam. Ct. 1990) (removing child from Ontario in violation of order granting respondent interim custody and prohibiting removal of child from Ontario without leave of court was in breach of respondent's rights of custody and wrongful within meaning of Convention).

As set forth above, the Hong Kong order dated February 23, 1999 provides that Christina may not be removed from Hong Kong before her 18th birthday without either leave of court or both parents' consent. Accordingly, this Court determines that Mr. Croll had a right, along with respondent, to determine Christina's place of residence and he had a corresponding right of custody within the meaning of the Convention. Christina's removal from Hong Kong — her habitual residence — was in violation of her father's right of custody and was, therefore, wrongful pursuant to the Convention.

II. *Defenses*

Ms. Croll urges that even if this Court were to determine that her former husband has a right of custody pursuant to the Convention, an order directing that Christina be returned

to Hong Kong should not issue because (1) Mr. Croll was not exercising his right of custody at the time of Christina's removal; (2) Mr. Croll consented to Christina's removal; and (3) returning Christina to Hong Kong would place Christina at grave risk of harm. All of these exceptions to the Convention are to be narrowly construed in order not to frustrate the objectives of the Convention. *See* 42 U.S.C. § 11601(a)(4).

A. *Exercise of Custody Right*

Ms. Croll claims that even if Mr. Croll had a "right of custody" within the meaning of the Convention, he failed to exercise that right and, thus, an order of return should not issue. *See* Convention Art. 3(b). Ms. Croll has the burden of establishing this defense by a preponderance of the evidence. 42 U.S.C. § 11603(e)(2)(B). Absent evidence that

> constitute[s] clear and unequivocal abandonment of the child [,] [o]nce [the court] determines that the parent exercised custody rights in any manner, the court should stop — completely avoiding the question whether the parent exercised the custody rights well or badly. These matters go to the merits of the custody dispute and are, therefore, beyond the subject matter jurisdiction of the federal courts.

Friedrich v. Friedrich, 78 F.3d 1060, 1066 (6th Cir. 1996) (Friedrich II); *see also Freier v. Freier*, 969 F. Supp. 436, 441 (E.D. Mich. 1996); *Sampson v. Sampson*, 975 P.2d 1211, 1218 (Kan. 1999).

Appendix B

Despite the parties' disagreement regarding the frequency of Mr. Croll's visits with Christina, he was exercising his right of custody at the time that Christina was removed from Hong Kong. Even if this Court were to credit Ms. Croll's testimony and assume that Mr. Croll visited Christina only twice per month, this evidence would be sufficient to find that Mr. Croll had not abandoned Christina and, thus, was exercising his right of custody prior to Christina's leaving Hong Kong. *See, e.g.*, *Sampson*, 975 P.2d at 1217-18. Consequently, petitioner has not relinquished his right of custody by failing to exercise that right.

B. *Consent*

Ms. Croll also contends that Mr. Croll consented to her taking Christina to the United States to live. To establish this defense, Ms. Croll must show, by a preponderance of the evidence, that Mr. Croll consented to or subsequently acquiesced in the removal of Christina from Hong Kong. 42 U.S.C. § 11603(e)(2)(B); *see Friedrich II*, 78 F.3d at 1069.

First, Ms. Croll claims that because her former husband never exercised his right under the Hong Kong interim order to request that the immigration department not issue Christina a passport without his consent, he impliedly consented to Christina's removal from Hong Kong. That argument is not persuasive. *Krishna v. Krishna*, No. 97-0021, 1997 WL 195439, at *4 (N.D. Cal. Apr. 11, 1997), on which respondent relies, is distinguishable. In that case, the court found that Mr. Krishna "freely provided" Ms. Krishna with their child's passport after Mr. Krishna spoke with one of Ms. Krishna's relatives in the United States who informed him of Ms. Krishna's intention to come to the United States. No such facts are present here.

In this case, Ms. Croll testified that she had always had control of Christina's passport. (Tr. at 66). Moreover, Mr. Croll testified that he never requested Christina's passport from Ms. Croll nor requested that the immigration department not issue Christina a passport because he had no reason to believe that Christina would be taken abroad without his knowledge and consent. (Tr. at 52-53). Mr. Croll's failure to avail himself of the protections afforded by the February 23 order, while perhaps imprudent in hindsight, does not establish by a preponderance of the evidence that Mr. Croll impliedly consented to Christina's removal from Hong Kong.

Moreover, although both parties testified that prior to separating they had discussed relocating to the United States, these discussions are irrelevant to the issue of whether Christina's father consented to her relocation to the United States subsequent to the separation. While Ms. Croll testified that she and Mr. Croll had several "casual discussions" after they separated about Christina moving with her to the United States, Ms. Croll could only recall one such conversation in any detail. (Tr. at 116-17). Specifically, on March 2, 1999, Mr. Croll allegedly agreed that it would be beneficial for Christina to live in the United States. (*Id.*). Mr. Croll, however, testified that he did not agree to that. (Tr. at 36, 38, 48). Given the conflicting testimony of Mr. and Ms. Croll, along with the fact that Mr. Croll filed this petition pursuant to the Hague Convention for Christina's return within a few weeks of his daughter's departure from Hong Kong, this Court finds that Ms. Croll has not established by a preponderance of the evidence that Mr. Croll consented to Christina's removal from Hong Kong.

C. *Grave Risk*

Ms. Croll also invokes the exception contained within Art. 13(b) of the Convention that provides that a child need not be returned to the country where the child is habitually resident if "there is a grave risk that [the child's] return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation." Convention Art. 13(b). A party seeking to invoke this exception must prove the applicability of the exception by "clear and convincing evidence." 42 U.S.C. § 11603(e)(2)(A). It is well-established that the grave risk exception is narrowly construed. *See* 42 U.S.C. § 11601(a)(4); *see also Blondin*, 1999 WL 626653, at *6; *Nunez-Escudero v. Tice-Menley*, 58 F.3d 374, 376 (8th Cir. 1995) (citing *Rydder*, 49 F.3d at 372); *Janakakis-Kostun*, 1999 WL 153369, at *6. In *Friedrich II*, the Sixth Circuit limited the circumstances under which the Article 13(b) exception applies to only when:

> return of the child puts the child in imminent danger prior to the resolution of the custody dispute — e.g., returning the child to a zone of war, famine, or disease [or when there has been] serious abuse or neglect, or extraordinary emotional dependence [and] the court in the country of habitual residence, for whatever reason, may be incapable or unwilling to give the child adequate protection.

78 F.3d at 1069.

There is no dispute that the first of the circumstances set forth in *Friedrich II* does not apply here: Hong Kong is

not a zone of "war, famine, or disease." Moreover, respondent has failed to demonstrate by clear and convincing evidence that returning Christina to Hong Kong would subject the child to a grave risk of harm or place her in an intolerable situation.

Ms. Croll testified to four specific instances to support her reliance on the Article 13(b) exception. First, she testified that on September 28, 1998, Mr. Croll assaulted her. (Tr. at 89, 98-99). Ms. Croll filed a complaint with the police relating to this incident, but the charges were dismissed due to an insufficiency of evidence. (Tr. at 42, 94, 96, 97-98). Although each party's version of this event differs, it is undisputed that Christina was not present during this incident. (Tr. at 90). The cases applying the Hague Convention make manifest that the Article 13 exception is only applicable when the child, as opposed to a parent, would be placed in danger if she were returned. *See Nunez-Escudero*, 58 F.3d at 376-77; *In re Walsh*, 31 F. Supp. 2d 200, 205 (D. Mass. 1998) ("It is thus apparent that the grave threat contemplated by the Convention must be directed at the children who are the subject of the petition . . .") (citing *Rechsteiner v. Kendell*, 80 A.C.W.S.3d 1195 (Ont. Fam. 1998)); *Ciotola*, 684 N.E.2d at 769 (insufficient evidence that child was at risk where child's mother testified that father had explosive temper and that she herself was victim of domestic abuse). Consequently, because this incident concerned solely Ms. Croll, even if this Court were to credit Ms. Croll's version of events, it would not support an Article 13 defense.

Second, Ms. Croll testified that on one occasion in November 1998, Mr. Croll forcibly dragged her into the

bedroom where they struggled in front of Christina before their housekeeper intervened to stop the fight. (Tr. at 101). Third, Ms. Croll testified that, on another occasion, while bathing Christina, she observed a red handprint mark on her daughter's thigh that she had reason to believe was caused by Mr. Croll. (Tr. at 102-03). Finally, on one occasion in early 1999, when Christina expressed a reluctance to accompany Mr. Croll to Cape Cod for a visit, Mr. Croll forcibly placed his hands on Christina's shoulder and spoke to her in a forceful manner. (Tr. at 105-06). Ms. Croll conceded that she has never filed a police report on behalf of Christina and she has not made any allegations of abuse against her husband on behalf of her daughter in Hong Kong or the pending New York State matters prior to the hearing held before this Court on July 6. (Tr. at 89, 119, 134). Thus, Ms. Croll has not demonstrated by clear and convincing evidence that Christina would be placed in "grave risk" were she to be returned to Hong Kong. *See Walsh*, 31 F. Supp. 2d at 206; *Janakakis*, 1999 WL 153369, at *6. Moreover, Ms. Croll has adduced no evidence to demonstrate that the Hong Kong courts would be incapable or unwilling to protect Christina adequately should she be in danger of being placed in a situation where she was at risk.

Because Christina has been wrongfully removed from her habitual place of residence and because none of the exceptions contained within the Convention apply, Christina should be returned to Hong Kong pursuant to ICARA and the Convention.

Appendix B

III. *Undertakings*

In light of this Court's determination that petitioner's application should be granted directing that Christina be returned to Hong Kong, the parties were requested to attempt to agree on appropriate undertakings by petitioner to ensure that Christina does not suffer any short term harm pending disposition of any custody and support dispute in the Hong Kong courts. *See, e.g., Feder v. Evans-Feder*, 63 F.3d 217, 226 (3d Cir. 1995); *Walsh*, 31 F. Supp. 2d at 207. Any such undertakings would not affect the Hong Kong courts' ability to enter final orders concerning custody and support arrangements. However, the parties were unable to agree on specific undertakings.

Accordingly, the Court hereby conditions Christina's return to Hong Kong on respondent's compliance with the following undertakings:

(1) Mr. Croll shall pay the U.S. $1,000 support for Christina each month pursuant to the ex parte order of the Hong Kong court dated May 3, 1999;

(2) Mr. Croll shall pay for airline tickets to Hong Kong for Mei Yee Croll and for Christina; and

(3) Mr. Croll shall pay tuition and fees for the current academic year for the school that Christina attended during the 1998-1999 academic year.

Mei Yee Croll shall continue to have "custody, care and control" of Christina and Stephen Halladay Croll shall

continue to have "reasonable access" to Christina pursuant to the February 23, 1999 order of the Hong Kong court. In addition, nothing in this Order shall be construed to prevent either petitioner or respondent from seeking a modification of the ex parte orders of the Hong Kong court dated February 23, 1999 and May 3, 1999 providing for custody and support for Christina and maintenance for respondent.

CONCLUSION

For the foregoing reasons, respondent's motion pursuant to Fed. R. Civ. P. 12(b) to dismiss the petition is denied and petitioner's application for an order pursuant to the Hague Convention directing the return of the parties' minor daughter to Hong Kong is hereby granted upon condition that petitioner provide the undertakings set forth above.

Dated: New York, New York
October 19, 1999

SO ORDERED:

s/ Sidney H. Stein
Sidney H. Stein, U.S.D.J.

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DENYING PETITION FOR REHEARING DATED AND FILED JANUARY 25, 2001

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

ROSEANN B. MACKECHNIE
CLERK

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 25th day of January two thousand and one.

Docket No. 99-9341

STEPHEN HALLADAY CROLL,

Petitioner – Appellee,

v.

MEI YEE CROLL,

Respondent – Appellant.

A petition for panel rehearing and a petition for rehearing en banc having been filed herein by the appellee Stephen Croll.

Appendix C

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED.**

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT
ROSEANN B. MACKECHNIE,
Clerk

By: s/ Beth J. Meador
Beth J. Meador
Administrative Attorney

APPENDIX D — JUDGMENT AND ORDER OF THE CONSTITUTIONAL COURT OF SOUTH AFRICA IN *SONDERUP v. TONDELLI* DATED AND DECIDED DECEMBER 4, 2000

[Omitted here but submitted separately as Lodging]